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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES-SAN FRANCISCO BRANCH OFFICE**

TRACY AUTO, L.P. dba TRACY TOYOTA

Respondent,

and

MACHINISTS AND MECHANICS
LODGE NO. 2182, DISTRICT OF LODGE
190, INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,

Charging Party/Petitioner.

No. 32-RC-260453; 32-CA-260614;
32-CA-262291

PETITIONER'S POST HEARING BRIEF

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Petitioner Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO (“Petitioner” or “Union”), hereby submits the following post-hearing brief in the above-referenced matter.

I. INTRODUCTION

This Hearing arises out of Petitioner’s attempt, starting all the way back in May 2020, to organize a bargaining unit of Service Technicians (“Techs”) at Tracy Toyota (“Employer”). For nearly a full calendar year, the Employer has engaged in a series of delay tactics designed to prevent these employees from exercising their legal right to form a Union. First, the Employer insisted on a “wall-to-wall” bargaining unit consisting of far more workers than the Union initially sought to represent. Then, when the Union scored a clear election victory—even among the Employer’s desired “wall-to-wall” voting unit—the Employer filed a more than 20 objections to the conduct of the election, the vast majority of which were found to be without merit by the National Labor Relations Board (“NLRB” or “Board”). But the delays did not stop there.

Prior to the start of the instant Hearing on the remaining objections, the Employer attempted to postpone the start of proceedings, asserting that the parties should wait until it was safe to hold the Hearing “in person.” (General Counsel Exhibit [“GC Exh.”] 1(x).) Because California was in the midst of a COVID-19 “winter surge” at this time, and the Board was not prepared to hold such a Hearing safely (and would not be for months), the Employer was essentially asking that the affected workers—who had already overwhelmingly voted to join the Union—be placed in an indefinite “limbo” until the pandemic abated. (GC Exh. 1(t)–1(w).)

Though Petitioner’s motion for a video hearing was granted, the Employer continued with its delay tactics. The hearing began on November 30, 2020, but did not conclude until January 29, 2021. In spite of the case involving relatively straightforward issues of supervisory status, the parties stretched 17 hearing days across this 60-day period, primarily due to the Employer’s numerous calendar conflicts. Furthermore, during the hearing, the Employer used a series of document requests to interrogate employees about their protected Section 7 activities. (See Joint Exhibit [“JT Exh.”] 7–8, Union’s “Petitions to Revoke Subpoenas Duces Tecum.”)

Taken together, these actions demonstrate a clear pattern wherein the Employer is attempting to “run out the clock” on the Union, despite its employees voting overwhelmingly to unionize.

Moving to the merits of the case, there are two sets of Objections at issue here: 1) Objection 20 and 21, relating to the allegedly inappropriate pro-Union activities of two Shop Foremen, Kevin Humeston and Tyrome Jackson; and 2) Objection 16(a), involving a Union staff member, Jesse Juarez, announcing the name and address of a replacement Foreman, Josh Spier, during a picket action outside the Employer’s premises. These Objections are meritless.

As for Objections 20 and 21, the weight of evidence is clear that the two Foremen, Humeston and Jackson, are “employees” within the meaning of the National Labor Relations Act (“Act”), and not statutory supervisors. While the Foremen regularly engage in certain supervisory tasks, such as “assigning” repair orders to other Techs, these tasks are routine and clerical in nature, and do not involve the use of independent judgment. Thus, any alleged pro-Union activities undertaken by these individuals are permitted under the Act.

Even if the Foremen were 2(11) supervisors, however, the record does not indicate that any of their actions rise to the level of coercion, intimidation, or harassment, such that these actions influenced employees’ freedom of choice in the election. The Employer was unable to produce evidence of any threats, express or implied, levied by the Foremen against other Techs. To the contrary, the Foremen were accommodating and respectful of their fellow Techs’ ability (or inability) to participate in Union activities, such as an ongoing picket action. Moreover, the Employer failed to provide evidence that the Foremen’s conduct “lingered” in the minds of voters. Jackson and Humeston were not even present at the worksite for the majority of the relevant period, as they had been permanently replaced after a walkout. Lastly, Tracy Toyota management engaged in a series of anti-Union actions in the lead-up to the election, diminishing the impact of the Foremen’s alleged “pro-Union” conduct in the minds of eligible voters.

Objection 16(a) also must fail. First, the Employer failed to prove that Juarez actually announced Spier’s home address while on the picket line. Juarez denied doing so, and the Employer presented no video or audio evidence confirming Spier’s version of events—or even

another witness who could confirm what Juarez allegedly said. Second, per the Employer's own argument, Spier is a statutory supervisor, and thus not a proper member of the voting unit. Since the Employer failed to present evidence that other employees actually heard Juarez's statement, this conduct could not have influenced any actual voters. And third, there is no Board precedent supporting the proposition that announcing someone's home address on a picket line, by itself—without any accompanying threats—constitutes objectionable conduct under the Act.

For these reasons, the Union requests that the Judge overrule the remaining objections, certify the bargaining unit, and finally allow the affected employees to bargain collectively with the Employer, an opportunity that has been kept from them for far too long.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On May 15, 2020, the Union filed a representation petition with Region 32 of the Board on behalf of a group of Service Techs employed at Tracy Toyota. (General Counsel Exhibit ["GC Exh."] 1(a).) On June 24, 2020, the Union and the Employer signed a Stipulated Election Agreement. (Union Exhibit ["U Exh."] 3.) The agreed-upon bargaining unit was as follows:

INCLUDED: All full-time and regular part-time technicians employed by the Employer (or who had accepted offers of employment) as of May 21, 2020, parts department employees, and service advisors employed by the Employer at its facility located at 2895 North Naglee Road, Tracy, California.

EXCLUDED: Porters, warranty administrators, confidential employees, office clerical employees, guards, and supervisors as defined by the Act.

(*Id.*, at p. 1)

The Region conducted a mail-ballot election to determine whether a majority of these workers wished to be represented by the Union for purposes of collective bargaining. Ballots were mailed out to the bargaining unit on July 17, 2020, and completed ballots were due back on August 5, 2020. (*Id.*) On August 7, at a formal ballot count, the Region counted 17 votes for the Union and 8 against the Union, out of 37 eligible voters. (GC Exh. 1(r), at p. 2.)

On August 14, 2020, the Employer filed Objections to Conduct of Election and Conduct Affecting the Results of the Election (“Objections”). (GC Exh. 1(r), Attachment “A”.) There were 21 Objections in total. (*Id.*) On October 23, 2020, the Regional Director for Region 20 issued a Notice of Hearing, overruling the vast majority of the Objections. (GC Exh. 1(r).) The Region directed only Objections 20, 21, and a portion of Objection 16, to hearing. (*Id.*, at p. 25.)

Separate from the Objections proceeding, the Union filed multiple unfair labor practice (“ULP”) charges with the Board. On May 28, 2020, before the election, the Union filed Case 32-CA-260614, alleging that the Employer’s failure to timely recall striking employees violated the Act. (GC Exh. 1(r).) The Union filed a related ULP, Case 32-CA-262291, (GC Exh. 1(g)), on June 26, 2020, and an amended charge on August 3, 2020. (GC Exh. 1(g).) On August 25, 2020, Region 20 of the Board issued a Complaint on these two ULP charges, and ordered the cases to be consolidated. (GC Exh. 1(l).) The ULP cases were further consolidated with the Objections case in the aforementioned order of October 23, 2020. (GC Exh. 1(r).)

On November 10, 2020, Administrative Law Judge (“ALJ”) Mara-Louise Anzalone ordered briefing on the issue of whether a video hearing was feasible in light of the ongoing COVID-19 pandemic. (GC Exh. 1(s).) Petitioner and General Counsel responded with formal motions for a video hearing. (GC Exh. 1(v), 1(w).) The Employer filed an Opposition to both Motions. (GC Exh. 1(x).) Judge Anzalone ultimately ordered a video hearing, to begin on November 30, 2020. (GC Exh. 1(cc).) The consolidated hearing continued for 17 hearing days over the next two months, and the record closed on January 29, 2021.

B. STATEMENT OF FACTS

1. Key Individuals

a. Kevin Humeston

Kevin Humeston is currently a Service Tech at Tracy Toyota. (Humeston Test., Day 6.) He has worked with the Employer for approximately nine years. (*Id.*) About two years ago, Humeston was promoted to Shop Foreman. (*Id.*) He served in that capacity until the date of the May 15 walkout, and then again for several months following his recall. (*Id.*)

Humeston was an active participant in the walkout and subsequent strike action. (Humeston Test., Day 6.) He was not one of the original cohort of four striking employees who were recalled to work on May 22, 2020. (Caro Test., Day 3.) The Employer offered to recall Humeston to his former position of Foreman on July 15, 2020, after Rene Cabrera was demoted from Shop Foreman to Service Tech. (*Id.*) However, Humeston broke his foot soon after, and did not officially return until to the Shop until August. (Humeston Test., Day 6; ER Exh. 30.)

b. Tyrome Jackson

Tyrome Jackson has nine (9) years' experience at Tracy Toyota. (Jackson Test., Day 4.) Around 2014, he transitioned into a new role as a Service Tech in the main shop. (*Id.*) Starting in 2019, he was asked by the Service Manager to serve as a backup dispatcher when the regular Foremen were unavailable. (Jackson Test., Day 5.) Jackson officially became a Shop Foreman in January 2020. (Jackson Test., Day 4; Jackson Test., Day 5.)

Jackson was an active participant in the walkout and subsequent strike action. He was not one of the original cohort of four striking employees who were recalled to work on May 22, 2020. (Caro Test., Day 3.) On or around August 18, the Employer offered to recall Jackson as a Service Tech, not a Shop Foreman. (Jackson Test., Day 4.) Jackson initially refused because he wanted his prior position as a Shop Foreman. (*Id.*; ER Exh. 15.) The Employer made a second offer to recall Jackson as a Tech on September 3, which Jackson accepted. (Jackson Test., Day 4.) He has continued to serve as a "backup" dispatcher since his recall, especially on weekends, when Josh Spier is not working. (*Id.*; Jackson Test., Day 5.)

c. Cesar Caro

Cesar Caro has been a Service Tech at Tracy Toyota since 2012. (Caro Test., Day 3.) His regular job duties include diagnostics, recalls, and repair work. (*Id.*) He works in the "main shop," alongside the other Techs and the Shop Foremen. (*Id.*) Caro is currently certified as a Master Diagnostic Technician ("MDT"), meaning he can perform "high level" recall jobs. (*Id.*) At the time of the walkout, Caro was not yet an MDT; he was merely a "master." (*Id.*) Caro obtained his MDT certification approximately two or three months prior to his testimony. (*Id.*)

While Caro is not a Shop Foreman, due to his experience, he is regularly tasked with dispatching work when neither of the Foreman is present in the shop. (*Id.*)

Caro was an active participant in the walkout and subsequent strike action. He was one of the original cohort of four striking employees who were recalled to work on May 22, 2020, alongside Ociel Solano, Mong Lo, and Phong Lo. (Caro Test., Day 3.)

d. Josh Vega

Josh Vega is a Service Tech at Tracy Toyota. (Vega Test., Day 8.) He was an active participant in the walkout and subsequent strike. Vega was not one of the original cohort of four striking employees who were recalled to work on May 22, 2020. (Caro Test., Day 3.)

e. Ociel Solano

Ociel Solano has been a Service Tech at Tracy Toyota for the past 4.5 years. (Solano Test., Day 14.) Solano was hired as an Apprentice, shadowing more senior Techs, and served in that role for approximately one year before becoming a full Tech. (*Id.*) He participated in the walkout, but was among the original group of four striking employees who were recalled to work on May 22, 2020, alongside Caro, Mong Lo, and Phong Lo. (Caro Test., Day 3.)

f. Josh Spier

Josh Spier is a Shop Foreman at Tracy Toyota. (Spier Test., Day 7.) He started with the Employer after the walkout, in late May or early June 2020. (*Id.*) Spier first became aware of the Union and the strike action when he reported to work and saw picketers outside of the shop. (*Id.*) Shortly after his hire date, Spier left the Employer, due in part to his desire to work a five-day, eight-hour schedule (as opposed to the regular four-day, 10-hour schedule), and in part because of the “chaos” surrounding the Union effort. (Spier Test., Day 8.)

On June 11, 2020, during Spier’s absence, Service Manager Robert Gallego offered Cesar Caro a promotion to Shop Foreman. (Caro Test., Day 3; GC Exh. 3; ER Exh. 5.) Gallego informed Caro that Spier had left the Employer. (Caro Test., Day 3.) After Caro declined, Spier came back to work. (*Id.*) Upon his return, Spier transitioned from the normal “4x10” schedule to his preferred five days per week, eight hours per day schedule. (Caro Test., Day 4.)

g. Robert Gallego

Robert “Bob” Gallego was the Service Manager at Tracy Toyota during most of the relevant time period. (Gallego Test., Day 9.) He started on March 28, 2020. (*Id.*) Gallego oversees the Service Department, which includes the Service Techs. (Gallego Test., Day 14.) The Shop Foremen report directly to him, as do the Service Advisors and Porters. (*Id.*) Gallego’s office is directly off the main shop floor, away from the main dealership business office. (*Id.*) According to Gallego, he meets with the Foremen on a daily basis, primarily to discuss “holdovers”—cars that remain at the shop overnight because a repair was not completed in one day. (*Id.*) He also makes a once-per-day “social” visit to the shop floor. (*Id.*)

h. Jason Miranda

Jason Miranda is the Business Manager at Tracy Toyota. (Miranda Test., Day 15.) He started with the Employer in July 2013, and has held several positions since then. (*Id.*) Miranda’s duties include overseeing accounting, human resources, hiring, and various “all-around business tasks.” (*Id.*) He is also the custodian of personnel documents. (*Id.*)

2. Shop Operations

a. Basic operations

Tracy Auto LP d/b/a Tracy Toyota is a car dealership located at 2895 Naglee Rd, Tracy, CA 95304. (GC Exh. 1(a).) While the Union’s bargaining unit includes employees in both the Parts Department and the Service Department, the focus of this proceeding is on the Service Department. As noted above, this Department is overseen by the Service Manager, who during the relevant time period was Bob Gallego. The Service Department is made up of Service Advisors, or Writers; Shop Foremen; and Service Technicians. The role of the Department is to perform maintenance work on Toyota vehicles, and to diagnose and repair vehicle defects.

The first point of contact for a customer in the Service Department is the Service Advisor, who diagnoses any issues with the vehicle (if the reason for the customer’s visit is a defect, as opposed to regular maintenance) and creates a repair order (“RO”). (Caro Test., Day 3.) The RO is then “dispatched” to a Service Tech by a Foreman. (*Id.*; Jackson Test., Day 4.)

Express Lube ROs, which include tire rotations and oil changes, have at times been dispatched through a separate process. (Caro Test., Day 3.) However, from January to August 2020, while the shop's Lube Center was closed, Lube Techs were working in the main shop, and Lube ROs were centrally dispatched alongside other types of work.¹ (Id.) According to Jackson, while the main shop Foreman would sometimes dispatch Lube work while the Lube Center was closed, other times Lube Techs assigned their own ROs. (Jackson Test., Day 5.) Josh Spier testified that he dispatches all types of ROs, including Lube. (Spier Test., Day 6.)

Each RO includes a "due time," set by the Service Advisor ("SA"), which takes into account shop capacity and customer need. (Jackson Test., Day 4.) The SA does not consult the Foreman or any other Techs when calculating the due time. (Id.) If a Tech is unable to complete the RO by the due time, the SA explains the situation to the customer, and a new time is set. (Id.) Where a job requires the assigned Tech to order parts, or complete work not contemplated in the initial RO, the Tech informs the SA, who relays this to the customer. (Id.)

Aside from the Service Advisors, Techs, and Foremen, the Service Manager visits the shop floor very frequently, to look at parts, give timecards, and check on the status of certain vehicles. (Humeston Test., Day 6.) The Service Manager's office borders the shop floor, separate from the Sales and Business offices. (Id.) Gallego testified that he visited the Shop Floor only once per day on a "social visit" of up to a half hour. (Gallego Test., Day 16.)

b. Employee compensation

Service Techs are paid using a "flat rate" system.² (Caro Test., Day 3.) Each type of RO is coded with a certain number of hours ("flag hours"). (Id.) The Tech assigned the RO is paid at a specific value rate for this number of hours—no longer how long the job actually takes.³ (Id.) For example, a Tech who is assigned an eight-hour RO will be paid for eight flag hours, no

¹ In August 2020, when the Lube Center reopened, the Lube Techs vacated their stalls in the main shop, and strikers were recalled to fill those stalls. (Caro Test., Day 3.)

² By contrast, Lube Techs are paid by the hour only, not by job performed. (Caro Test., Day 4.)

³ Caro testified that his personal hourly value rate was \$38.21, for example. (Caro Test., Day 4.)

matter if the job takes eight clock hours, ten clock hours, or four clock hours. (*Id.*) This theoretically allows a Techs to be paid for more time than they actually work; for example, a Tech can finish two “five hour” ROs within a single eight-hour shift. (*Id.*)

According to Jackson, the Service Manager is responsible for ensuring that Techs are meeting their “efficiency” goals. (Jackson Test., Day 4.) For example, if a Tech is consistently taking more time to complete ROs than the assigned “flag” hours would dictate (i.e., clock hours outnumber flag hours), the Service Manager will “talk” with them. (*Id.*) The Service Manager also posts a notice showing the efficiency rates for each Service Tech, including the Foremen. (*Id.*) However, Jackson was not aware of any instances of discipline for efficiency issues. (*Id.*)

Outside of the flat rate system, Techs receive “idle time” pay. This comes into play during periods where the Tech has not been assigned an RO, or for any time the Tech is working beyond the “flag” hours on a given RO (i.e., if a Tech takes four hours to complete a two-hour job, they will be paid “idle time” for the third and fourth hour). (Jackson Test., Day 4.) The pay rate for idle time is double the applicable minimum wage. (Humeston Test., Day 6.)

Foremen receive additional compensation for “dispatch” duties. (Caro Test., Day 3.) This comes in the form of a monthly bonus of 50 cents for every labor hour produced by the shop, divided by the number of dispatchers. (*Id.*; Jackson Test., Day 4; GC Exh. 5.) “Backup” Foremen receive a pro-rata version of this bonus reflecting the labor hours produced during the time they served as dispatcher. (Caro Test., Day 3; Jackson Test., Day 4.) Jackson testified that he often dispatches on Saturdays, when Spier does not work. (Jackson Test., Day 5.)

c. Technician “certifications”

“Certifications” play a major role in what ROs can be assigned to which Service Tech. Humeston testified that there are at least five (5) Toyota certifications that Service Techs can obtain: engine; drive train; suspension; electrical; and hybrid. (Humeston Test., Day 6.) This does not include the “base-level” Toyota maintenance certification, which only qualifies a Tech to perform Express Lube Tech work, such as oil changes and tire rotations. (*Id.*)

According to Caro, “certified” Toyota Technicians can perform all warranty repair work and certain factory recall jobs (i.e., electrical recalls). (Caro Test., Day 3.) “Warranty” jobs are those where the time and labor costs are covered by the Toyota manufacturer’s warranty. (Jackson Test., Day 4; Humeston Test., Day 6.) Technicians who do not have Toyota certifications are only qualified to perform customer pay (“CP”) maintenance work, where the vehicle is no longer covered by the manufacturer warranty due to age or damage (Jackson Test., Day 4; Humeston Test., Day 6), and/or Express Lube work. (Caro Test., Day 3.) Lube work is usually performed by designated Lube Techs, however, who are generally either apprentices or not Toyota certified. (Caro Test., Day 3; Jackson Test., Day 4.)

Caro classified CP work as “entry-level” or beginner. (*Id.*) Jackson agreed that no certifications are required for CP jobs, and that this work can be performed by “basically anyone.” (Jackson Test., Day 4; Jackson Test., Day 5.) According to expert witness Steve Halleck, 80% of CP ROs are “extended maintenance” jobs, including scheduled intermediate maintenance appointments at the 5,000, and 7,500 mileage intervals, and beyond. (Halleck Test., Day 10.) These jobs, which might include brake realignments, for example, require only a “basic, entry-level skillset” and qualifications. (*Id.*) CP maintenance ROs seldom involve actual repairs. (*Id.*) Halleck noted that because basic maintenance work takes up such a large percentage of CP ROs, Technician skillset is “not as a big of a deal” in the CP world. (*Id.*)

Non-certified Techs cannot perform warranty repair or recall jobs. (Caro Test., Day 3.) Caro estimated that obtaining Toyota certification takes about two years, while obtaining a “master” certification takes about five years. (*Id.*) For CP jobs, however, the manufacturer does not place any certification limitation on who can perform the work. (Caro Test., Day 4.) For Lube jobs, which are included in the CP category (Halleck Test., Day 10), only the basic Toyota maintenance certification is required. (Humeston Test., Day 6.)

Unrelated to Toyota certification, Service Techs also hold “ASE” certifications from the National Institute for Automotive Service Excellence. (Caro Test., Day 3.) Caro testified that in his role as backup dispatcher, he does not consider ASE certifications when determining which

Tech should be assigned an RO.⁴ (*Id.*) Moreover, dispatchers are only able to view and access Toyota certifications, not ASE certifications, through the on-site computer system. (*Id.*)

Aside from warranty jobs and recalls, which require Toyota certification, CP work, which does not require certification, and Lube work, which requires only a maintenance certification, Techs can also be assigned “internal” or “ISP” jobs, and “used car” jobs. (Caro Test., Day 3.) ISP jobs, including “comebacks”,⁵ do not require any particular certification. (*Id.*) Used car ROs are usually handled by a designated used car Tech.⁶ (*Id.*; Humeston Test., Day 6.)

d. Categories of work performed in the shop

Caro testified that a “majority” of the work at the shop was either recall or Express Lube, including oil changes. (Caro Test., Day 3.) Caro knows this because he served as backup Foreman, and because he observed and walked around the shop. (*Id.*) For example, a fuel pump recall that affected “five or six” car models was announced after the strike.⁷ (*Id.*; Humeston Test., Day 6.) Because only four Techs were certified to work on this recall, Caro was overloaded with work. (Caro Test., Day 3.) In March 2020, there was a large airbag recall, and Caro observed again that this recall took up most of time. (*Id.*)

Caro testified that in the months immediately preceding and following the walkout, he and the other Service Techs (not including Lube Techs) performed mostly warranty jobs. (Caro Test., Day 3.) This was consistent with Caro’s experience during the entirety of his tenure. (*Id.*) Humeston agreed that a high percentage of ROs were warranty. (Humeston Test., Day 6.)

⁴ For example, Rene Cabrera has an electrical certification through ASE. (Caro Test., Day 3.) This does not mean he can perform electrical recall work at Tracy Toyota, which would require Toyota certification. (*Id.*)

⁵ When a car returns due to employee error, the “comeback” is classified as ISP, and the dealership pays. (Jackson Test., Day 5.) If the comeback presents a legitimately new issue, however, the job can be warranty or CP. (*Id.*)

⁶ According to Jackson, the vast majority of used car repairs go to “Oscar,” the designated certified used car Tech. (Jackson Test., Day 5.) These jobs are rarely dispatched by the main shop Foremen. (*Id.*)

⁷ Humeston testified that this recall affected “almost every” Toyota model. (Humeston Test., Day 6.)

According to Jackson, in his experience as a dispatcher, about 75% of ROs were warranty; 25% were CP; and 5% were “internal” or “ISP”, including “comebacks.” (Jackson Test., Day 4.)

Caro noted that after the walkout, so many recall jobs coming were into the shop that this was the only type of work he and other certified Techs could perform. (Caro Test., Day 3.) Because the certified Techs were working on recalls, and non-certified Techs were not qualified to perform warranty work, non-recall warranty jobs were simply not getting done. (*Id.*)

Expert witness Steve Halleck noted that during the pandemic, there was a “steep decline” in CP transactions, while warranty work was up 125% in June 2020. (Halleck Test., Day 10.) Thus, according to Halleck, it makes sense that Techs would be busier during this time period, because a larger percentage of ROs were warranty jobs requiring Toyota certification. (*Id.*)

According to data produced by Halleck, in July 2019, the Employer recorded 1,678 CP ROs; 300 warranty ROs; 643 internal ROs; 267 new car ROs; and 1,085 Xpress Lube ROs, for a total of 3,037. (ER Exh. 42.) These statistics are somewhat misleading, however.⁸ Express Lube ROs are included twice—once in their own category labeled as Express Lube, and again within the larger category of Customer Pay. (*Id.*) Remove the 1,085 Xpress Lube jobs from the 1,678 total CP jobs, and this leaves just 593 non-Lube CP jobs in July 2019.

e. Technician work schedule

Service Techs generally work a “4x10” schedule, meaning four days per week, 10 hours per day. (Caro Test., Day 3; ER Exh. 8.) During the relevant period, Techs were organized onto three teams. (*Id.*) The teams existed for purposes of scheduling only; Foremen were not attached to any individual team as a “leader.” (*Id.*; Humeston Test., Day 6.) One team works Monday through Thursday; the second works Wednesday through Saturday; and the third works a split shift, Monday, Tuesday, Friday, and Saturday. (Gallego Test., Day 16; ER Exh. 8.)

⁸ 1,678 + 300 + 643 + 267 + 1,085 is 3,973—more than 3,037.

3. Foremen Duties

Shop Foreman work alongside the other Techs in the main shop. (Jackson Test., Day 4.) Like other Service Techs, they have their own stall, car lift, and toolbox. (*Id.*) Jackson estimated that when he was a Foreman, he spent about 75% of his time performing Service Tech work, and 25% of his time performing Foreman-specific tasks. (Jackson Test., Day 4.) According to Humeston, he still performed as much repair work as any other Tech when he was a Foreman—about 80 “flat rate” hours every two weeks.⁹ (Humeston Test., Day 6.)

a. Dispatching warranty work

Jackson outlined a two-step process for dispatching warranty ROs. (Jackson Test., Day 4.) He first checks the internal “TIS” computer system to see which Techs have the requisite Toyota certification to perform the work. (*Id.*) This requires inputting the car’s VIN number into TIS, and then selecting the type of warranty job; this produces a list of certified Techs. (*Id.*) For recall jobs specifically, Foremen also have access to a certification chart that shows each Tech and whether they can perform each type of recall. (Humeston Test., Day 6; GC Exh. 27.)

Next, if there are only one (or zero) Techs on schedule that day that are certified for the job, the RO must either go to that Tech or to the Foreman himself. (Jackson Test., Day 4.) Humeston noted that there is often only one certified Tech available to perform a given warranty repair job.¹⁰ (Humeston Test., Day 6.) On the other hand, if multiple Techs are certified for the job, the Foreman determines which of these Techs have the available time and capacity to take on the RO, based on the ROs that have already been assigned. (Jackson Test., Day 4.) The TIS system also includes the flag and labor hours for each job. (*Id.*)

Humeston generally echoed Jackson’s description. (Humeston Test., Day 6.) He also noted that the TIS system will show not only which Techs are certified to perform a given repair

⁹ 80 “flat rate” hours every two work weeks is equivalent to a “100% efficiency standard,” which applies to all Service Techs in the Shop. (Humeston Test., Day 6.)

¹⁰ Humeston identified Hybrid repairs as an example of where this occurs, as the Shop had only two (2) Techs certified to perform these jobs. (Humeston Test., Day 6.) He named fuel recall jobs as another example. (*Id.*)

job (with an “x” next to their name), but also the Tech’s years of service with the Employer. (*Id.*) According to Humeston, he decides which Tech gets assigned a warranty RO based on their certification and their availability to finish the job by the due time. (*Id.*) Humeston noted that the order in which he assigns ROs is primarily controlled by the due time. (*Id.*)

Caro testified that he checks his fellow Techs’ Toyota certifications on this website when serving as backup dispatcher. (Caro Test., Day 3.) Per Caro, he knows the certifications of the longer-tenured Techs off the top of his head, but for newer Techs, including strike replacement workers, he has to input the VIN number of the car into the Toyota website. (Caro Test., Day 4.) The website then displays a list of Techs who are certified for that job. (*Id.*)

b. Dispatching CP work

As for dispatching non-warranty CP jobs, Jackson stated that he first checks the Tracy Toyota “All Data” system to determine the labor hours for the RO. (Jackson Test., Day 4.) This dictates which Tech will be assigned the RO. (*Id.*) As an example, if a job requires 10 hours of work, the Foreman must assign it to a Tech who has 10 open hours before the car’s due time—i.e., will not be stuck working on other ROs during this time window. (*Id.*) Jackson stated that he will also save less-consuming ROs with later due times (i.e., the end of the day) and assign these last, because these are least pressing jobs. (Jackson Test., Day 5.) Humeston agreed, noting that when he assigns CP work, he first determines who is available based the expected labor hours (from the All Data system) and the due time. (Humeston Test., Day 6.)

Humeston provided another example: if an RO requires 14 hours of labor time, a Foreman will not assign it to a Tech who is already working on another eight-hour RO—especially if that Tech is not working the next day, and cannot carry the job over. (Humeston Test., Day 6.) According to Humeston, there were “never really a lot of Techs available,” because the Shop was often running with a low staff due to sick calls.¹¹ (*Id.*)

¹¹ Humeston stated that this was true both before and during the COVID-19 pandemic. (Humeston Test., Day 6.)

Jackson stated that with respect to CP jobs, as a final step in the dispatching process, he will consider the available Techs' relative knowledge and skill, as well as their certifications. (Jackson Test., Day 5.) He also consults with the Techs on their comfort level with certain jobs. (*Id.*) Humeston testified that he takes the speed in which a Tech can complete the job into consideration. (Humeston Test., Day 6.) Through his observations of the shop floor as Foreman, Humeston knows which Techs are "fastest." (*Id.*) Another factor that Humeston considers which available Tech (assuming there is more than one) likes that type of job more. (*Id.*)

c. Miscellaneous Foreman duties

Occasionally, a Tech will tell the Foreman that he cannot handle an assigned RO, either because he lacks the requisite skill or experience, or is too busy with other work. (Jackson Test., Day 4; Humeston Test., Day 6.) Humeston testified that the shop is "free flowing," and he will simply reassign the job. (Humeston Test., Day 6.) When this occurs, neither the Tech nor the Foreman is disciplined. (Jackson Test., Day 4; Humeston Test., Day 6.)

The Foremen receive some amount of input from the Service Manager as to which ROs should go out first. (Jackson Test., Day 4.) According to Jackson, the Service Manager will designate certain ROs as "heat" cases, for example, if a customer is upset, a diagnostic or repair job is taking too long, or hurrying up is necessary for some other reason.^{12 13} (*Id.*) Humeston noted that the Service Manager will instruct Foremen to give these ROs to more experienced Techs. (Humeston Test., Day 6.) The General Manager will even get involved at certain times if a customer is unhappy with a recent purchase. (Jackson Test., Day 4.)

¹² Jackson testified that he has on occasion received instruction from Service Manager Bob Gallego to assign warranty ROs to non-certified Techs when no certified Techs are available, to "get it done." (Jackson Test., Day 4.) According to Jackson, he resisted these instructions, because the manufacturer can "kick back" the costs of the repair to the dealership if they find out a non-certified Tech is doing the work. (*Id.*) Gallego admitted in his own testimony that the Toyota factory can charge the dealership if non-certified Techs perform warranty work. (Gallego Test., Day 16.)

¹³ According to Humeston, he would generally assign a "heat" or "hurry" case to himself or to a more experienced tech, such as Mong Lo or Cesar Caro. (Humeston Test., Day 6.)

Caro testified extensively about his role as “backup” Foreman, wherein he serves as dispatcher when neither Foreman is available to work. (Caro Test., Day 3.) The Service Manager, in this case Bob Gallego, designates one or more of the Service Techs to perform this role. (*Id.*) Aside from dispatching work, Caro testified that when he is working as the backup Foreman, he will also “help” other Service Techs if one of them needs his help; and “guide” new Techs through the process—for example, on electrical diagnostic jobs, which only pay one (1) flat hour, but can take a less experienced Tech two hours or more. (*Id.*) According to Caro, he usually only helps out in this manner when he is working as the dispatcher, unless a Tech is assigned to “harder diagnostic” work. (*Id.*) In that situation, Caro will provide guidance even when the regular Foremen are present, and he is just working as a Service Tech. (*Id.*)

When the shop is slow, Humeston will assist a less experienced Tech with a tough diagnostic job. (Humeston Test., Day 6.) However, Humeston also noted that all of the more experienced Techs, whether or not they are Foremen, help out younger Techs. (*Id.*) Humeston further testified that he had been helping out other Techs with certain jobs since before he became a Foreman, and that all more senior Techs will assist their younger counterparts. (Humeston Test., Day 13.) According to Humeston, each individual Tech has strengths and weaknesses, and the group works together well as a team. (*Id.*)

4. Unionization effort at Tracy Toyota

a. Pre-walkout events

According to Cesar Caro, the Service Techs at Tracy Toyota participated in two Union meetings prior to the walkout. (Caro Test., Day 3.) Jesse Juarez, a Union organizer employed by Petitioner, “led” both of these meetings. (*Id.*) The first meeting took place two or three weeks before the May 15, 2020 walkout, with every Service Tech besides one or two in attendance. (*Id.*) The second meeting took place about one week before the walkout, with every Tech present. (*Id.*) Both of the meetings took place at the private home of a Tech. (*Id.*) Discussion topics included workplace safety and COVID-19; job security; and apprenticeship

and advancement. (*Id.*) The result of these meetings was a decision to go forward with the unionization effort and “rely on” Mr. Juarez. (*Id.*)

b. Walkout and subsequent strike action

On Friday, May 15, 2020, the Tracy Toyota Service Techs met for an early morning meeting. (Caro Test., Day 3.) According to Caro, Mr. Juarez then led a “march on the boss” action to the office of Tracy Toyota General Manager (“GM”) Jae Lee. (*Id.*) Lee agreed to participate in an outdoor meeting, wherein the Techs demanded that the Employer recognize the Union. (*Id.*) Lee informed the group that he could not make any such decision without the input of Tracy Toyota owner Ronnie Lott. (*Id.*)

On Saturday, May 16, the day after the walkout, Mr. Juarez sent a message instructing the Techs not to report to work that day. (Caro Test., Day 3.) On Monday, May 18, 2020, the Techs received an email from management stating that due to the ongoing strike action, the Employer would be hiring permanent replacement workers. (*Id.*; GC Exh. 2; ER Exh. 13.)

The striking workers participated in a picket action on the sidewalk outside of the Employer’s facility on Tuesday, May 19, 2020. (Caro Test., Day 3.) The action lasted from 8:30 a.m. to 12:30 p.m. (*Id.*) All of the Service Techs except for one, Travis Catolico, participated in the picket.¹⁴ (*Id.*) The picketers held signs with messages such as “[we] want respect.” (*Id.*) While Humeston made approximately 8 to 10 of these signs, all of the picketers chipped in, according to Jackson. (Jackson Test., Day 13.)

On Wednesday, May 20, 2020, pursuant to instructions from Mr. Juarez, each of the striking Techs offered to return to work via email. (Caro Test., Day 3; Caro Test., Day 4; ER Exh. 11.) There was no response from the Employer. (Caro Test., Day 3.) The strike and picket action therefore continued on May 20 and May 21. (*Id.*)

Tracy Toyota management agreed to meet with the strikers on Thursday, May 21, 2020. (Caro Test., Day 3.) All 14 of the striking Techs attended the meeting; also present were GM Jae

¹⁴ Two Service Techs, Jesus Alcazar and Ahn “John” Mai were designated as on leave at the time of the walkout. Jesus participated in the picket on Tuesday, May 19, while Mai did not.

Lee, owner Ronnie Lott, Service Manager Bob Gallego, and attorney John Boggs. (*Id.*) The meeting ended in confusion, as it was unclear if the workers were making an “unconditional” offer to return—i.e., whether there was still a demand that the Employer recognize the Union. (*Id.*) Shop Foremen Kevin Humeston and Tyrome Jackson were the “designated speakers” at this meeting. (*Id.*; Caro Test., Day 4.) At a subsequent meeting the same day, the striking Techs made a full, unconditional offer to return to work, communicated by Caro. (Caro Test., Day 4.) In response, the Employer offered to create a “preferential recall” list. (Caro Test., Day 3.)

Additionally, on Friday May 22, 2020, the Employer offered to recall four (4) striking Techs to fill open positions not yet filled by permanent replacements. (Caro Test., Day 3.) These were Caro; Phong Lo; Mong Lo; and Ociel Solano. (*Id.*) Neither of the Shop Foremen, Kevin Humeston and Tyrome Jackson, were recalled; the Foremen slots were filled by two replacement workers: Josh Spier and Rene Cabrera. (*Id.*)

III. LEGAL ARGUMENT

“Representation elections are not lightly set aside.” *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citations omitted). “There is a strong presumption that ballots cast under NLRB procedural safeguards reflect the true desires of the employees.” *Id.* at 328. The objecting party bears the “entire burden” of proving that misconduct warrants overturning the election. *Id.*; *see also Lalique N.A., Inc.*, 339 NLRB 1119, 1122 (2003) [The burden of proof is on the party seeking to set aside a Board election, and that burden is a “heavy one.”]; *Chicago Metallic Corp.*, 273 NLRB 1677, 1704, n.163 (1985). This burden encompasses every aspect of the prima facie case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984).

The applicable test used to identify objectionable conduct depends upon who is accused of being at fault. Where the objecting party alleges that another party to the election, or its agent, committed the objectionable conduct, the objecting party must show that the acts “interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of an election.” *NLRB v. Gulf States Cannerys*, 634 F.2d 215, 216 (5th Cir. 1981); *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995)

(Objectionable conduct “has the tendency to interfere with ... freedom of choice.”); *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip. op. 1, fn. 2 (2017) (“The burden is on the objecting party to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election.”); *Transcare New York, Inc.*, 355 NLRB 326 (2010).

In determining whether party misconduct has the tendency to interfere with freedom of choice, the Board considers:

(1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Taylor Wharton Division, 336 NLRB 157, 158 (2001); *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986); *Phillips Chrysler Plymouth, Inc.*, 304 NLRB 16 (1991).

Only conduct occurring during the “critical period” can form the basis for objectionable conduct in mail-ballot elections. See *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962). Here, this critical window started on May 15, 2020, when the Union filed its initial representation petition, and ended on July 17, 2020, when the mail ballot election began.

A. THE EMPLOYER FAILED TO MEET ITS BURDEN OF PROVING OBJECTION NUMBERS 20 AND 21.

The Employer objected to the conduct of the election on the grounds that Humeston is a statutory supervisor and engaged in improper pro-Union activity. According to Objection 21, “Kevin Humeston, a 2(11) supervisor, referred to as a Shop Foreman, engaged in pro-union activity thereby intimidating, coercing and influencing voters to vote in favor of the Union.” (GC Exh. 1(r), Attachment “A”, at p. 16.) Humeston’s alleged actions are listed below:

- a. Humeston led technicians to demand that the Company recognize the Union as the bargaining representative alongside Jesse Juarez, the Union Organizer, on May 15, 2020.
- b. From May 18 until July, 2020, daily, Humeston engaged in daily picketing alongside

[Techs] and held picket signs which were pro-union and anti-employer in content.

c. Humeston assisted in blocking the entrance so customers could not freely enter and informed customers that work was performed by non-certified technicians and on more than one occasion informed customers to get their service work done elsewhere. Specifically, on one occasion, on June 23, 2020, a customer came to the dealership in a Lexus vehicle to have her car serviced. Humeston told her that she should instead go to Livermore Toyota and gave her the name of the person to speak with at Livermore.

d. Humeston led the striking [Techs] to confront management and speak on behalf of the technicians on May 21, 2020 and demanded that as a condition of returning to work from strike that the Employer had to recognize the Union as bargaining representative.

e. Humeston against led the striking technicians to management to speak on behalf of the Union and to give an unconditional offer to return to work by the striking workers.

f. Humeston engaged in pro-union activity as set forth herein in detail above in the Background section which is incorporated herein by reference.

g. Humeston met with [Techs] to get their support for the Union and against Employer.

h. Humeston actively campaigned against the Employer and for the Union by posting anti-company social media posts criticizing the Employer, making false and defamatory statements about the Employer and its services, and stating that the Union should be accepted by management.

i. Humeston attended the ballot count by video stating he was one of the workers.

(*Id.*, at pp. 17-18.)

Humeston is not a supervisor, and even if he was, these actions are not objectionable. Additionally, the Employer failed to present evidence supporting its allegations that Humeston participated in much of this conduct. For example, the Employer failed to support its claims that Humeston “assisted in blocking the entrance so customers could not freely enter”; “informed customers that work was performed by non-certified [Techs]”; “informed customers to get their service work done elsewhere”; “told [a customer] that she should ... go to Livermore Toyota”; or “actively campaigned against the Employer and for the Union by posting ... social media posts criticizing the Employer, making false statements about the Employer and its services.”

The Employer further objected to the election on the grounds that Jackson is a statutory supervisor and engaged in improper pro-Union activity. According to Objection 21, “Tyrome Jackson, a 2(11) supervisor, referred to as a Shop Foreman, engaged in pro-union activity

thereby intimidating, coercing and influencing voters to vote in favor of the Union.” (GC Exh. 1(r), Attachment “A”, at p. 19-20.) Jackson’s alleged actions are listed below:

- a. Jackson led technicians to demand that the Company recognize the Union as the bargaining representative alongside Jesse Juarez, the Union Organizer, on May 15, 2020.
- b. From May 18 until mid-July, 2020, daily, Jackson engaged in daily picketing alongside technicians and held picket signs which were pro-union and anti- employer in content.
- c. Jackson assisted in blocking entrance so customers could not freely enter the facility.
- d. Jackson led the striking technicians to confront management and speak on behalf of the technicians on May 21, 2020 and demanded that as a condition of returning to work from strike that the Employer had to recognize the Union as legal bargaining representative.
- e. Jackson against led the striking technicians to management to speak on behalf of the Union and to give an unconditional offer to return to work by the striking workers.
- f. Jackson engaged in pro-union activity as set forth herein in detail above in the Background section which is incorporated herein by reference.
- g. Jackson actively met with Techs to get support for the Union and against Employer.
- h. Jackson actively campaigned against the Employer and for the Union by posting anti-company social media posts criticizing the Employer, making false and defamatory statements about the Employer and its services, and stating that the Union should be accepted by management.
- i. Jackson attended the ballot count by video stating he was one of the workers.

(*Id.*)

Again, notwithstanding the issue of whether Jackson is even a supervisor, these actions are not objectionable, or even particularly close. Additionally, the Employer failed to present evidence supporting its allegations that Jackson participated in these acts. For example, the Employer failed to support its claims that Jackson “assisted in blocking entrance so customers could not freely enter the facility”; “actively met with Techs to get support for the Union and against Employer”; “actively campaigned against the Employer and for the Union by posting anti-company social media posts criticizing the Employer, making false and defamatory statements about the Employer and its services, and stating that the Union should be accepted by management; or “attended the ballot count stating he was one of the workers.”

1. The shop foremen are not Section 2(11) statutory supervisors.

“Supervisors” are not considered “employees” under the Act, and therefore are not protected from retaliation for supporting a union or engaging in concerted activity. More importantly, supervisors do not have the automatic right to union representation or inclusion in a bargaining unit. Section 2(11) of the Act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).

The NLRB has developed a three-part test from this definition, under which an individual is a statutory supervisor if (1) they hold the authority to engage in any of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a “merely routine or clerical nature,” but requires the use of “independent judgment”; and (3) their authority is held “in the interest of the employer.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), citing *NLRB v. Ky. River Cmty. Care Inc.*, 532 U.S. 706, 713 (2001).

The NLRB “cautions against” a finding of supervisory authority based on a putative supervisor’s “infrequent” performance of Section 2(11) functions. *See Family Healthcare, Inc.*, 354 NLRB 254 (2009) (overruled on other grounds). “The exercise of some supervisory authority in a ... perfunctory or sporadic manner does not confer supervisory status on an employee.” *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988), *quoting Feralloy West Co.*, 277 NLRB 1083, 1084 (1985). Thus, “the Board exercise[s] caution not to construe supervisory status too broadly.” *Oakwood Healthcare, Inc.*, 348 NLRB at 688 (2006), *quoting Chevron Shipping Co.*, 317 NLRB 379, 381 (1995); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

When a worker spends only a portion of their time performing supervisory duties, the “regularity and substantiality” of those duties are of “utmost importance.” *Oakwood Healthcare, Inc.*, 348 NLRB at 694 (2006). According to the NLRB, “regular” means “according to a pattern

or schedule, as opposed to sporadic substitution.” *Id.*, citing *St. Francis Medical Center West*, 323 NLRB 1046, 1046-47 (1997). The Board will not find individuals to be supervisors based on alleged authority that they did not know they possessed and where its exercise was sporadic and infrequent. See *Greenspan, D.D.S., P.C.*, 318 NLRB 70, 76 (1995), *enfd.* 101 F.3d 107 (2d Cir. 1996); see also *Tree-Free Fiber Co.*, 328 NLRB 389, 392-393 (1999).

“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Croft Metals, Inc.*, 348 NLRB 717 (2006). “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* “The authority to effect an assignment . . . must involve a degree of discretion that rises above the routine or clerical.” *Id.* (internal quotations removed).

At the outset, it should be noted that the Shop Foremen at Tracy Toyota are full Service Techs. They are still expected to perform 80 “flag” hours of repair and maintenance work every two work weeks—i.e., they need to meet the 100% efficiency standard, just like every other Tech. As noted above, Jackson estimated that he spent about 75% of his time performing Service Tech work, and 25% of his time performing Foreman-specific tasks. (Jackson Test., Day 4.) Humeston testified that he still performed as much repair work as any other Tech, even while serving as a Shop Foreman. (Humeston Test., Day 6.)

The *Caliber Motors* case is relevant here. See *Caliber Motors Inc., dba Mercedes Benz of Anaheim*, Case No. 21-RC-21275, 2011 Reg. Dir. Dec. LEXIS 175 (2011). This case involved the supervisory status of “Team Leaders” in the service department of a car dealership. *Caliber Motors*, at *1-2. As discussed in more detail below, Team Leaders at this dealership are comparable in duties and responsibilities to the Shop Foremen at Tracy Toyota:

Team Leaders spend as much as 90% of their work time “wrenching,” or performing repair work on vehicles in the capacity of a technician. The remainder of the Team Leaders’ time is spent on such tasks as distributing work to other technicians, reviewing repair orders, helping the other technicians, performing diagnostic

functions, completing ministerial paperwork, and occasionally reviewing lease-back vehicles or going on “ride-alongs” with customers.

Caliber Motors, at *4.

Ultimately, for reasons discussed in more detail below, the Region in *Caliber Motors* decided that these “Team Leaders” were not statutory supervisors:

I conclude that the Employer has failed to meet its burden to show that the Team Leaders at issue have the authority to effectively recommend transfer, promotion, or raises for other employees and cannot conclude that they are supervisors within the meaning of Section 2(11) of the Act based thereon.

Caliber Motors, at *33-34.

Like the Team Leaders in *Caliber Motors*, Humeston and Jackson spent the clear majority of their time working as Service Techs, while also “distributing work to other technicians,” “reviewing repair orders,” “helping the other technicians,” “and completing ministerial paperwork.” Therefore, the Judge should draw the same conclusion here.

a. The Employer cannot show that the Shop Foremen exercise “independent judgment” while exercising any supervisory tasks

Not every employee who participates in the hiring or interview process is performing a “hiring” function within the meaning of Section 2(11) of the Act. Even someone who evaluates a job applicant is not “hiring” if management performs its own “independent investigation” before acting on the evaluation. *See Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 n.9 (1998). Indeed, where upper management is also participating in the interview process, it makes it less likely that putative supervisors have the authority to “effectively recommend” hiring. *Id.*, citing *Waverly-Cedar Falls Health Care (“Waverly-Cedar Falls”)*, 297 NLRB 390, 392 (1989).

According to Jackson, he had no authority to hire employees, did not participate in any interviews of potential applicants, and had “no say” in who was hired in the Shop. (Jackson Test., Day 4.) Humeston also testified he never hired any employees. (Humeston Test., Day 6.) Miranda confirmed that the General Manager and appropriate Department Manager make final hiring decisions. (Miranda Test., Day 15.) Given that the Employer provided zero evidence to

dispute Humeston's and Jackson's assertions, there would be no reasonable basis to find that the Shop Foremen at Tracy Toyota are involved in the hiring process.

By contrast, the Team Leaders in *Caliber Motors*, who were found *not* to be supervisors, had some involvement in hiring:

One Team Leader testified that he participated in a first-round interview of a prospective technician, asking technical questions and ascertaining certification and expertise. Other Team Leaders testified that although they sat-in on some interviews about 5 years ago, they did not ask any questions of the applicant, nor did they offer any input or make any recommendation regarding hire.

Caliber Motors, at *15-16.

Therefore, given Miranda's explicit testimony that the General Manager and Department Managers make final hiring decisions (Miranda Test., Day 15), *even if* the Tracy Toyota Foremen had *some* limited role in hiring prospective applicants, they still would not exercise the requisite independent judgment to be considered supervisors.

b. Assign

The Board construes the term "assign" to "refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare, Inc.*, 348 NLRB at 689 (2006). This not merely "choosing the order in which the employee will perform a task," or "ad hoc instruction that an employee perform a discrete task." *Id.*

"Assigning employees according to their known skills is not evidence of independent judgment." *Shaw Inc.*, 350 NLRB 354, 355 (2007). While *Shaw* involved the construction industry, the same principle can be applied here. Furthermore, in *Veterans Care Centers of Oregon*, 2017 NLRB LEXIS 628 (2017), the Board notes: "assignments that are based on well-known employee skills ... do not involve independent judgment," and "[b]asing an assignment on whether the employee is capable of performing the job does not involve independent judgment." *Veteran Care*, at *27. Even in the seminal *Oakwood* case, the Board held:

If there is only one obvious and self-evident choice ... then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data ... Therefore, the mere fact that a nurse's skillset is considered when making patient assignments is not controlling in an analysis of supervisory status.

Oakwood Healthcare, 348 NLRB at 693.

Here it is not entirely clear whether the Foremen are “assigning” work within the meaning of Section 2(11). The Region in *Caliber Motors* found that that Team Leaders who performed very similar duties did not actually “assign”:

There is little evidence that the Team Leaders assign actual tasks to their respective team members, in that the general repairs needed are set forth by the Service Advisor in the work order, and the technicians, who are all certified, know what needs to be done to effectuate these repairs. Although the record suggests that Team Leaders do disburse the work orders generated by the Service Advisors to the technicians, there is insufficient evidence that much independent judgment is utilized. Rather, the record suggests that assignments are based, in large part, on the time frame established by the Service Advisor and the general work flow, over which the Team Leader has little control ... [S]everal [Team Leaders] explained that they assigned tasks in a fairly routine manner depending on who was available at a given time.

Caliber Motors, at *25-26; *see also Shaw, Inc.*, 350 NLRB at 355 (holding that a construction project foreman did not “assign” work within the meaning of the Act where he “might tell a crew-member to run a loader, or bulldozer, or to pull pipe, inform welders how he wants the work done, or switch the task assignments of employees during the day”).

Just like the Team Leaders in *Caliber Motors*, Humeston and Jackson “disburse ... work orders,” and generally have “sole authority” to dispatch jobs. However, at Tracy Toyota, the “general repairs” required by a job are also contained in the RO; the ROs are also “generated by” Service Advisors; and Techs also “know what needs to be done to effectuate these repairs,” without much, if any, input from the Foreman. However, *even if* the Foremen are found to “assign” work when they dispatch, they do not use independent judgment in this process, for the same reasons outlined in the *Caliber Motors* decision.

“Independent judgment with respect to assignment is not established where there is lack of evidence as to what factors a putative supervisor considers ... evidence limited to vague or hypothetical testimony that putative supervisors play to employees’ strengths is insufficient.” *WSI Savannah River Site*, 363 NLRB No. 113, slip op. at *3 (2016). Moreover, independent judgment is not shown without “detailed evidence showing the selecting of one employee over another to perform a particular task.” *Cook Inlet Tug & Barge, Inc.*, 362 NLRB at 1155; *Brusco Tug & Barge Co.*, 359 NLRB 486, 492 (2012). Here, like in these cases, the Employer has not met its burden of showing the use of independent judgment with respect to assignment.

The process by which Shop Foremen at Tracy Toyota go about dispatching, or assigning, ROs to other Service Techs was discussed in detail at the Hearing. The dispatch process differs depending on whether the RO is warranty or CP, each of which are discussed below. At times, however, work is assigned differently. According to Jackson, senior Techs can essentially assign work to themselves. (Jackson Test., Day 5.) Jackson himself has done this since being recalled as a Service Tech in September 2020. (*Id.*) If he cannot find the Foreman, he will simply walk over and pick up an RO that has not yet been assigned. (*Id.*) Jackson estimated that he does this eight times per week. (*Id.*) Obviously, when workers assign their own ROs (Jackson testified that Lube Techs also do this at times), the Foremen need not use any independent judgment.

This conclusion is supported by the *Caliber Motors* case, wherein “[t]here was ... testimony that the technicians assigned themselves work when no Team Leader was available, or even decided among themselves how to distribute certain tasks.” *Caliber Motors*, at *26. If Techs’ assignment of certain jobs to themselves helped persuade the Region in *Caliber Motors* that Team Leaders were not exercising independent judgment, the same should be true here.

Service Techs also have the right to refuse specific assignments from the Foremen. Neither Jackson nor Humeston testified that they ever denied a Tech’s request not to perform a certain job. Jackson stated that he does not have the authority to override such a request; instead, he will either reassign the RO or perform the work himself. (Jackson Test., Day 5.) Again, if the

Foremen do not have the ability to force a Tech to take on a certain RO, they lack independent judgment, and their actions do not rise above the level of “clerical or routine.”

Lastly, at Tracy Toyota, certain types of jobs are dispatched outside of the normal warranty or CP process. For example, the Service Manager designates certain ROs as “heat” cases, where a customer is upset, an RO is taking too long, or speed is of the essence for some other reason. (Jackson Test., Day 4.) Humeston testified that the Service Manager will instruct Foremen to give these ROs to certain more experienced Techs. (Humeston Test., Day 6.) The Region in *Caliber Motors* described a very similar process in that dealership:

Repair jobs classified by the Service Advisor as “waiters” are given highest priority, since that designation means that the customer is actually waiting at the premises for the repair to be completed. In these circumstances, the Team Leader assigns those jobs to the technicians with particular expertise or assigns multiple technicians.

Caliber Motors, at *6.

Given the similarities between the two cases, if the assignment of certain high-pressure, high-priority jobs to Techs with more expertise was not sufficient for a finding of independent judgment in *Caliber Motors*, there is no independent judgment here either.

Warranty repair orders

The process for dispatching “warranty ROs” at Tracy Toyota is quite simple. The Foreman first checks the internal “TIS” computer system to see which Techs have the requisite Toyota certification to perform the work. If there is only one Tech on schedule who is certified for the job, the RO must either go to that Tech or to the Foreman himself. But if multiple Techs are certified for the job, the Foreman determines which has the available time and capacity to take on the job, based on the ROs that have already been assigned.

As discussed above, assigning work to employees according to their known skills—i.e., their documented certification status—is not evidence of independent judgment.¹⁵ *See Volair*

¹⁵ For example, Cesar Caro testified that David Cayo and David Hignite do not perform CP transmission work because they are Lube Techs. (Caro Test., Day 4.) Such knowledge of employees’ known skills does not rise to the level of independent judgment.

Contractors, Inc., 341 NLRB 673, 675 fn. 10 (2004); *S.D.I. Operating Partners, L.P.*, 321

NLRB at 111. For example, in *Shaw, Inc.*:

The foreman's designation of which crewmembers will perform particular functions is often based on an employee's trade or known skills, and is, thus, essentially self-evident. For example, if an operator is part of a crew, he will operate the heavy equipment, a fuser will fuse plastic pipe, and a welder will handle metal pipe. Such assignments do not involve the exercise of independent judgment.

Shaw Inc., 350 NLRB at 355-56.

Here, Humeston and Jackson's consideration of various Toyota certifications when dispatching warranty jobs is comparable to the construction foreman in *Shaw, Inc.* looking at "trade or known skills" when assigning work. Just like in that case, the Foremen at Tracy Toyota are not using independent judgment.

There is some dispute over what percentage of the Employer's total ROs are warranty jobs. Three of the dispatchers (or backup dispatchers) who testified, Humeston, Jackson, and Caro, stated that the majority of work that they dispatch is warranty. While the statistics presented by expert witness Steve Halleck seem to contradict this testimony, these statistics are somewhat misleading. According to Halleck's data, in July 2019, the Employer recorded 1,678 CP ROs and 300 warranty ROs. (ER Exh. 42.) However, Halleck stated up to 80% of these CP jobs involve routine interval maintenance, not repair work. (Halleck Test., Day 10.) Moreover, of these 1,678 CP jobs, 1,085 of them were Express Lube ROs, which may or may not be dispatched by the Shop Foremen. Given this context, it makes more sense why Foremen would be under the impression that there are more warranty jobs in the shop—these are the ROs that they are actually dispatching most often.

Customer pay repair orders

First and foremost, the process for creating and dispatching customer pay ROs in the instant case is very similar to the process in *Caliber Motors*, where the Region found the Team Leaders not to be statutory supervisors:

With regard to the workflow in the Service Department, the basic procedure is as follows: a customer who brings a vehicle in for repair meets initially with a Service Advisor, who creates a repair order. Then, the order is printed out in the work area of the Team Leader for the team assigned to that Service Advisor. The Team Leader pulls the order, and then refers it to a particular technician based on the requirements of the job, the expertise needed, the priority of the repair, and the availability of one or more technicians.

Caliber Motors, at *15-16.

Humeston and Jackson testified that when dispatching CP work, they consider which Tech is available; the priority of the repair (i.e., due time); and, if multiple Techs are available, the expertise needed to complete the job. (Humeston Test., Day 6; Jackson Test., Day 4.) Thus, the process for dispatching CP work in the instant case is very similar to the dispatching process in *Caliber Motors*, where the Team Leaders were found not to be supervisors.

The Foremen at Tracy Toyota made very clear that the primary deciding factor for CP jobs is which Tech is available, based on the due time and the Tech's own workload. (Humeston Test., Day 6; Jackson Test., Day 4.) This is consistent with *Caliber Motors*, where the Region found that "[a]ssignments are based, in large part, on the time frame established by the Service Advisor and the general work flow, over which the Team Leader has little control." *Caliber Motors*, at *26. If the Team Leaders in *Caliber Motors*—who were found not to be using independent judgment—were dispatching work based on due time and shop workflow, the Tracy Toyota Foremen are not supervisors either, because they use these same factors.

Furthermore, it is well-established that consideration of how much work employees have already been assigned in the course of their duties does not indicate the use of independent judgment. *See Oakwood Healthcare*, 348 NLRB No. 37, slip op. at *9 (work assignments made on the basis of equalizing workloads is routine or clerical in nature and does not involve exercise of independent judgment). Before dispatching, when Humeston or Jackson look at whether a Tech can finish and RO before the due time based on what jobs the Tech already has that day, they are simply "equalizing workloads" within the meaning of *Oakwood Healthcare*.

Even beyond these factors, subsequent consideration of an employee's level of expertise, experience, or skill does not require independent judgment. In *Caliber Motors*, Team Leaders considered "the expertise needed" when deciding which technician should get a repair job. *Caliber Motors*, at *15-16. Moreover, various Board cases from other industries make clear that consideration of skill and expertise in assigning work is not an indicator of supervisory status:

Decamp provides direction and guidance to other employees involved in a project based on his experience and craft skill. He directs employees to perform various necessary tasks according to the skills they have previously demonstrated, inquiring of the employees, as needed, whether a particular job is within their expertise. These responsibilities involve no real managerial discretion that would require the exercise of independent judgment.

S.D.I. Operating Partners, L.P., 321 NLRB 111, 111 (1996);

As noted above, Humeston testified that he will consider the speed in which a Tech can complete a job, because he knows which Techs are "fastest." (Humeston Test., Day 6.) Humeston also consults with Techs regarding their comfort level with certain jobs, and considers which available Tech likes the type of job more. (*Id.*) This is almost identical to the assignment process outlined in *S.D.I. Operating Partners*, where the "leadman," Decamp, considered "skills" that employees had "previously demonstrated," and "inquir[ed] of the employees, as needed, whether a particular job is within their expertise." 321 NLRB at 111.

Lastly, it is notable that various witnesses testified that CP work is entry level, and can be performed by most, if not all, of the Employer's Techs. For example, Jackson testified that CP work can be performed by "basically anyone." (Jackson Test., Day 4; Jackson Test., Day 5.) Halleck noted that CP jobs require only a "basic, entry-level skillset" and qualifications. (Halleck Test., Day 10.) It is well-accepted that where employees are equally qualified to perform a given task, there is no independent judgment in assigning work among them:

There is no dispute that all ICU nurses are qualified to care for any patient. Thus all ICU nurses are required ... to be regularly certified in various skills ... Since all ICU RNs are qualified to perform nursing care, neither [of the charge nurses who testified] considers the relative skills of each RN in assigning patients.

Fremont-Rideout Health Group, 357 NLRB 1899, 1918 (2011).

Because Express Lube work is considered part of the CP category, it worth noting the process for dispatching these ROs here. These jobs generally go to dedicated Lube Techs, who only need the “base-level” Toyota maintenance certification. (Humeston Test., Day 6.) And Lube ROs are not always dispatched by the Shop Foremen. Either way—whether the Shop Foremen are assigning work to dedicated Lube Techs based on their known skills, or the Lube Techs dispatch their own ROs—the Shop Foremen are not exercising independent judgment.

Comeback or ISP repair orders

When dispatching “comeback” or ISP jobs, Jackson stated that his first inquiry is whether the Tech who was assigned to the initial RO can handle the repair. (Jackson Test., Day 5.) If the answer is no, the Foremen will generally handle the job themselves. Obviously, the Foremen are not exercising independent judgment when they dispatch ISP ROs to themselves. But it is also well-settled that basing assignments on who has previously worked with a given customer, client, or patient, is merely clerical and routine decision-making. *See Fremont-Rideout Health Group*, 357 NLRB at 1918 (holding that a nurse’s reliance on “continuity of care” in making patient assignments weighed against a finding of “independent judgment”).

Technician Work Schedules

Jackson testified that he had no authority to grant leave or overtime requests as a Shop Foreman. (Jackson Test., Day 4.) According to Jackson, only the Service Manager can approve overtime. (*Id.*) Humeston agreed on both points, stating that he has no say in who is awarded overtime, and only the “management team”—Gallego, Parts Manager Mike Felix, and General Manager Jae Lee—can grant overtime. (Humeston Test., Day 13.) Humeston also noted that when the Service Manager is out, Felix will step in and take over some of the Service Manager’s day-to-day duties, including granting overtime requests. (Humeston Test., Day 6.) The Shop Foreman never steps in as “acting” Service Manager in this situation. (*Id.*)

On occasion, when a Tech became sick during a work day, they would inform the Foreman before going home. (Jackson Test., Day 5.) During the COVID-19 pandemic, Jackson

testified that he instructed a Tech who felt ill to leave the shop and get tested.¹⁶ (*Id.*) Another time, a Tech called to inform Jackson that his wife had died of COVID, and he was quarantining in the hospital and would need a leave of absence. (*Id.*; ER Exh. 17.) Jackson then reported this information to the General Manager, Jae Lee, and Business Manager, Jason Miranda, because the Tech was unable to reach these individuals himself. (Jackson Test., Day 5.)

Humeston noted that when a Tech leaves work due to illness, he will “relay” this to management. (Humeston Test., Day 6.) For example, when employee “J” needed an extension for his disability leave, Humeston told Gallego about the extension request, and provided “J” with the appropriate forms. (Humeston Test., Day 13.) Humeston testified that as a Foreman, he is just a “messenger” with respect to other Techs requesting time off from work. (*Id.*) When Humeston himself needed to miss work, he always informed the Service Manager, as well as the backup dispatcher “as a courtesy.” (*Id.*) Miranda confirmed that the Shop Foremen report to him when a Tech goes home sick for the day. (Miranda Test., Day 15.)

Ociel Solano stated that he would inform a Shop Foreman when he was running late for work, with the expectation that the Foreman would tell a manager. (Solano Test., Day 14.) Solano himself also sent text messages to Service Manager Bob Gallego requesting time off from work due to illness, and sent emails to Business Manager Jason Miranda asking about COVID-19 leave issues. (*Id.*; ER Exh. 73A, p. 012-013.) According to Solano, Miranda was the “best person” to whom he could send this type of email, whereas on the other hand, he did not “feel comfortable” sending the email to Foreman Josh Spier. (*Id.*)

Jackson testified that on more than one occasion he had to act as a go-between for Techs and management regarding scheduling issues. (Jackson Test., Day 5; ER Exh. 17.) He once had to email Gallego and Miranda regarding a Tech, “J” who needed an extension on his COVID-19 leave but did not know how to contact management. (*Id.*) Another time, Tech Travis Catolico

¹⁶ According to Jackson, he would usually send someone to the Service Manager when they asked to leave work. (Jackson Test., Day 5.) However, at the beginning of the pandemic, the shop did not have a Service Manager because Bob Gallego had yet to start. (*Id.*)

informed Jackson that he needed to call out sick because of a pending COVID-19 test. (*Id.*) Jackson passed this information along to Gallego, Miranda, and Jae Lee. (*Id.*)

According to Jackson, he had no authority as a Foreman to excuse employees from work, for COVID-19-related reasons or otherwise. (Jackson Test., Day 5.) No one from management ever told Jackson he had this power. (*Id.*) Moreover, neither Jackson nor Humeston testified that they ever denied a Tech's request to leave work early for medical reasons. If there is any dispute about a leave issue, Jackson stated that he would go to the Service Manager. (Jackson Test., Day 5.) Humeston testified that he did not have the power to grant leave requests as Shop Foreman. (Humeston Test., Day 6.) Additionally, Humeston testified that while he had requested certain Techs to come in on their days off for staffing reasons, he only did this when a manager asked him to, not of his own accord. (Humeston Test., Day 13

Similar issues came up in *Caliber Motors*. For example, in that case:

Technicians may request vacation or paid days-off utilizing the Request for Vacation form which they present to their respective Team Leaders. If a technician needs to leave work early due to illness, doctor's appointment, or family emergency, Team Leaders have been told they may unilaterally release that person and no form or advance approval is required ... If a technician is going to be late to work, he can call the Team Leader ... and so advise him. The Employer suggests that the Team Leaders, in connection with their ostensible assignment of work, approve requests for time off. The evidence shows that, to the contrary, the Team Leaders merely check the calendar and then pass the requests on to the Service Manager for approval. There was no evidence adduced that a request was ever questioned or denied by a Team Leader, further supporting the conclusion that such "approval" of these requests is merely routine and/or ministerial.

Caliber Motors, at *13-14.

This seems remarkably similar to the process described in the testimony of Humeston, Jackson, Solano, and others. Techs at Tracy Toyota will sometimes go to their Shop Foreman with scheduling issues—like sick calls or leave requests—but they have no actual authority to grant or deny such requests. Just like the Team Leaders in *Caliber Motors*, the Tracy Toyota Foremen are “approving” Techs’ time off and medical leave requests in a merely “routine and/or ministerial” manner, not actually exercising independent judgment.

The June 2020 Tech work schedule has a note at the bottom, “revised 4-30-30 by Kevin,” referring to Kevin Humeston. (Humeston Test., Day 6.) According to Humeston, he did not normally create or edit the schedule—this was the Service Manager’s job—but did on this occasion because the new Service Manager, Bob Gallego, had just arrived, and was not aware of the proper employee rotation. (*Id.*; ER Exh. 8.) Humeston made no substantive alterations to the schedule at this or any other time. (*Id.*) Gallego confirmed this in his own testimony, clarifying that he was the one who wrote the “revised by Kevin” note. (Gallego Test., Day 16.)

Again, there is no evidence that the Foremen are responsible for creating or maintaining the weekly work schedules. Even if they did have this responsibility, however, it would not rise to the level of “independent judgment.” From *Caliber Motors*: “[a]mong the ... duties of the Team Leaders is the maintenance of daily attendance sheets that reflect which technicians are working on a given day.” *Caliber Motors*, at *13. These Team Leaders were still found not to be supervisors, despite their maintenance and control over the technician’s weekly schedule, which is far more control than the Foremen at Tracy Toyota possess over their schedule.

i. Fire/Suspend/Discipline

According to Jackson, he had no authority to fire or discipline other employees as a Shop Foreman. (Jackson Test., Day 4.) Only the Service Manager has this power. (*Id.*) Humeston said the same in his testimony. (Humeston Test., Day 6.) Jackson also stated that he had never filled out any “disciplinary action” forms as a Foreman.¹⁷ (Jackson Test., Day 5.)

Notwithstanding this, employees can have some degree of involvement in the disciplinary process and still not qualify as supervisors under the Act. For example, in *Caliber Motors*:

The Employer introduced a handful of written disciplines of technicians issued between 2004 and 2008, which were written by the Service Manager, and some of which were signed or witnessed

¹⁷ According to Jackson, he never laid off any employees as a Shop Foreman, nor did he recommend any layoffs. (Jackson Test., Day 4.) Humeston said the same. (Humeston Test., Day 6.)

by Team Leaders ... The evidence only shows that Team Leaders signed the [disciplinary] warnings, sometimes as a witness ... Thus, the record evidence on this issue fails to establish that Team Leaders independently issue warnings or take any other action that might constitute discipline, and suggests that they function primarily in a reportorial function ... there is little evidence of any actual involvement of the Team Leaders in recommending, approving, or implementing disciplinary action.

Caliber Motors, at *17, 29; *see also Children's Farm Home*, 324 NLRB 61, 61 (1997) ("The authority to effectively recommend means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is followed."); *S.D.I. Operating Partners, L.P.*, 321 NLRB at 112 ("Instructing employees concerning the Employer's rules, even in their breach, demonstrates neither authority over the employees nor the exercise of independent judgment as required by Section 2(11).")

Corrective Action Forms

The GC produced one "involuntary separation of employment" notice, which included a "termination summary," that was signed by General Manager Jae Lee and a former Service Manager. (GC Exh. 35.) According to Miranda, Lee signs "most" separation notices. (*Id.*; Miranda Test., Day 15.) Miranda testified that while the Employer does use written suspension and termination forms, he was not sure whether Shop Foremen sign them. (Miranda Test., Day 15.) Miranda could not recall seeing any such notices signed by Foremen. (*Id.*) Thus, it is apparent that whatever role Foremen play in the disciplinary process, they are not involved in more serious disciplinary actions, such as suspension or termination.

The Employer may argue that Foremen give out less serious discipline to Techs, i.e., written write-ups, for efficiency and workmanship issues. In his testimony, Humeston had no recollection of a Tech receiving discipline (other than a Comeback Report—see below) for poor workmanship, aside from one incident involving a drive belt recall that took place "years ago." (Humeston Test., Day 6.) Jackson testified that he never disciplined or recommended discipline of another Tech for low efficiency rates. (Jackson Test., Day 4.) According to Gallego, however, Service Techs have a file in the HR office for instances of bad workmanship or

repeated comebacks. (Gallego Test., Day 14.) Gallego will “sometimes” sign off on these write-ups, and is always the one who places the write-up in the file. (*Id.*)

The Employer was able to produce one written write-up given out to Tyrome Jackson and signed by a former Foreman, Jorge Santiago. (ER Exh. 9.) The disciplinary action form included a signature block for the Foreman, for the “preparer of the warning,” and for a “manager.” (Jackson Test., Day 5; ER Exh. 9.) The form also had a space for a “supervisor” signature that was left blank, and another block with the printed name Joe Silva, the former Service Manager. (*Id.*) Santiago filled out a separate signature block for the “foreman.” (*Id.*)

According to Jackson, discipline is not valid unless signed by the General Manager, or another manager, and an HR representative. (Jackson Test., Day 5.) The Foreman’s signature alone is insufficient. (*Id.*) The Employer produced one discipline form given to Tyrome Jackson and signed by a former Foreman, Jorge Santiago. (ER Exh. 9.)

None of the evidence on the record is sufficient to show independent judgment with respect to employee discipline. This case is comparable to *Shaw, Inc.* in that way. There, “Foremen [were] provided corrective action notice forms (also referred to as write-up sheets) to document employee infractions, which may be used as bases for disciplinary action.” *Shaw Inc.*, 350 NLRB at 355. In *Shaw, Inc.*, one of these Foremen, Watson, testified that:

[He] completed a number of “writeup” sheets to memorialize incidents in which an employee failed to comply with the employee handbook ... Watson’s further testimony also establishes that he generally did not know what, if any, disciplinary action was taken pursuant to his write-ups. Thus, the record does not establish that the write-up forms played a significant role in the disciplinary process, or that Watson exercised discretion in determining whether to complete writeup forms.

Id.

The same Foreman also “testified that he signed corrective action forms at the bottom where it says Supervisor because he is there when it happens and somebody can’t write it up that ain’t there and sees what’s going on,” *Id.* at 357, n.17, and that:

He once forwarded to Supervisor a writeup regarding an employee who walked off the job. He noted on the form that the handbook

called for discharge and added the words “Recommending discharge.” Watson testified that he never saw that employee working again, but that he does not know if he ever got fired or just never come back.

Id.

Clearly, just because employees write-up other employees, and even recommend their discharge, does not mean they are supervisors under the Act. The Employer has failed to produce specific evidence of incidents where Foremen have used their discretion to effectively recommend discipline, without upper management independently investigating the issue.

Comeback Reports

In the case of a comeback, the SA creates a “Vehicle Comeback Report,” which also includes a “diagnostic” section. (Jackson Test., Day 5; Miranda Test., Day 15; ER Exh. 10; ER Exh. 26; ER Exh 32; ER Exh. 37.) These Reports include a “reviewed and approved by” signature block for the Service Manager, the Foreman, and the Tech involved in the original repair. (*Id.*) Humeston testified that there is no requirement that a Foreman fill out a Comeback Report; a Tech can do so as well. (Humeston Test., Day 6.)

Jackson filled out one such Report on April 13, 2020, relating to a prior February 13 repair assigned to Tech Mong Lo. (Jackson Test., Day 5; ER Exh. 27.) There is no indication that this Report led to any discipline for Lo, however. Humeston completed a Comeback Report involving an earlier repair worked on by Tech Earl John “EJ” David, where Humeston determined that the cause of the issue was an “improper repair.” (Humeston Test., Day 5; ER Exh. 29.) Again, however, there is no indication that David was disciplined for this incident, or, even if he was, that Humeston’s determination was the deciding factor.

Humeston testified that he had never heard of discipline arising out of a Comeback Report, and that he is not sure for what purpose management uses the Reports. (Humeston Test., Day 6.) According to Miranda, there is no automatic rule for the number of Comeback incidents a Tech can have without getting disciplined or terminated. (Miranda Test., Day 15.)

Again, while the Foremen may have some involvement in drafting Comeback Reports, the Employer failed to show specific examples of these reports leading to discipline based solely

on the discretion of the Shop Foreman, as opposed to the Department Manager. Just like in *Shaw*, “the record does not establish” that these Comeback Reports “played a significant role in the disciplinary process.” 350 NLRB at 355. Moreover, the Reports have an “approved by” signature block for the Service Manager, (ER Exh. 10; ER Exh. 26; ER Exh 32; ER Exh. 37), meaning that even if they did constitute discipline, the Foreman do not have sole discretion.

ii. Promote/Transfer

Jackson testified that he had no authority to promote or transfer employees as a Shop Foreman, nor did he ever draft written evaluations. (Jackson Test., Day 4.) Humeston never promoted any employees or completed written employee evaluations. (Humeston Test., Day 6.) The Employer did not present any evidence to dispute these assertions, other than vague, conclusory allegations that Humeston may have “helped” Travis Catolico transition from a Lube Tech to a main shop Service Tech. Per the *Caliber Motors* decision, however, this is not enough:

In another instance about 4 years ago, a Team Leader asked that a trainee on the Express Service Team be promoted to technician and placed on his team. Some months later, the promotion took place, but the individual was put on another team ... With regard to transfer and promotion of team members, there are examples in the record where Team Leaders either urged the service manager to transfer someone off their team or to keep someone .. [T]he Employer argues that since the action occurred after Team Leaders' recommendations, it must be inferred that the action occurred because of the recommendations. This inference alone, in the absence of clear record testimony, is not enough to meet the Employer's burden of showing that the Team Leaders had the authority to effectively recommend transfers or promotions.

Caliber Motors, at *11.

Here, just like in *Caliber Motors*, the Employer failed to present “clear record testimony” that Humeston “had the authority to effectively recommend” the promotion of Catolico, or any other Tech. The Employer did not present documents or witnesses to explain how the promotion or transfer process even works. There is thus no basis for a finding that the Foremen should be considered 2(11) supervisors on the basis of promoting or transferring other employees.

iii. Reward

In November 2019, Jackson received a pay increase from \$29 to \$31 per hour, allegedly because he was serving as “backup” dispatcher at the time. (Jackson Test., Day 5; ER Exh. 18.) This pay increase form was filled out by a prior Foreman, Jorge Santiago. (*Id.*) Jackson testified that he never filled out one of these forms in the course of his duties as a Foreman, however, (Jackson Test., Day 5), and that he had no authority to grant wage increases or bonuses as a Foreman. (Jackson Test., Day 4.) Humeston agreed. (Humeston Test., Day 6.) The Employer presented no evidence to contradict these assertions. Therefore, during the *relevant* time period (Humeston and Jackson’s tenure) it is apparent that the Shop Foremen did not have the authority to grant pay increases or bonuses to other Techs.

At Tracy Toyota, Certain ROs—airbag recalls, wire harnesses, fuel pumps, engine replacements, and brake jobs, among others—generally require fewer “clock” hours than assigned flag hours. (Caro Test., Day 4; Humeston Test., Day 6.) These jobs theoretically allow a Tech to rack up multiple flag hours for each actual clock hour. According to Humeston, the Foremen and the Techs talk amongst themselves to decide who should be assigned these more favorable jobs. (Humeston Test., Day 6.) Humeston described the process as a “team effort.” (*Id.*) On the other hand, certain ROs are known as inefficient—they generally require more clock hours to complete than assigned flag hours. (Caro Test., Day 4.)

The Employer might argue that a text message exchange between Ociel Solano and Jackson, where Solano claims that he is “drowning in gravy” because “you know how Spier do,” is evidence of the Foremen’s power to reward Techs with more efficient (i.e., gravy) ROs. (Jackson Test., Day 13; ER Exh. 71, p. 003.) According to Jackson, this exchange actually indicated that Spier was known to assign Techs more efficient “gravy” jobs that usually went to Foremen, because Spier himself was not very productive Tech. (*Id.*) Additionally, in a text message exchange between Spier and Vega, Spier claims that he would assign Vega “good” jobs to make up for previous “bad” jobs. (Vega Test., Day 14; ER Exh. 82A, p. 009.)

Aside from these hypothetical and lighthearted text message exchanges, the Employer did not present any evidence that Shop Foremen at Tracy Toyota have a practice of “rewarding” certain Techs with more efficient, gravy, jobs, and “punishing” others with less efficient jobs. Each witness who testified on the subject denied that this was a practice. When the dealership in *Caliber Motors* made a similar spurious argument, the Region dismissed it:

It appears that the Team Leader can somewhat control the pace of work by assigning tasks to particular technicians, and also to some extent control the amount of income generated by the Employer by deciding to rebuild, repair, or replace parts, or by using new or used parts, but there are no concrete examples in the record of these decisions and their effects. All the Team Leaders who testified asserted that they try to complete each job efficiently and economically.

Caliber Motors, at *7.

The Employer’s argument in the instant case, that the Foremen’s ability to “reward” other Techs with better-paying work, is similarly unpersuasive, given that just like in *Caliber Motors*, there “are no concrete examples in the record of these decisions and their effects.” Without any real-world evidence, the Employer’s arguments are conclusory.

iv. Responsibly direct

“[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Croft Metals, Inc.*, 348 NLRB 717 (2006) (citing *Oakwood*, *7-8.) “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.” *Id.* “It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.*

The Employer may argue that the Shop Foremen at Tracy Toyota “responsibly direct” the work of Service Techs, because the Foremen can be disciplined if the Techs fail to adequately complete their work. Jackson, however, testified that each Tech is ultimately responsible for

timely finishing work. (Jackson Test., Day 5.) If a Tech misses their due time on an RO, the Tech is subject to discipline, not the Foreman. (*Id.*) It is the Tech, not the Foreman, who talks to the SA and the customer about scheduling a new due time. (*Id.*) Additionally, Jason Miranda testified that *he* is ultimately responsible for clearing ROs on time. (Miranda Test., Day 15.)

Gallego claimed that hypothetically, he would discipline a Foreman if there were “constant complaints” from Service Advisors that ROs were not being completed on time. (Gallego Test., Day 16.) He was only able to give one example: Rene Cabrera was demoted from Foreman to Tech at least in part because he was unable to “dispatch properly.” (Gallego Test., Day 14.) According to Gallego, Techs were not completing their jobs “in a timely manner,” and Cabrera was not giving “the right job to the right Tech.” (*Id.*) Gallego did not testify that he had granted *Cabrera* the authority to discipline any Techs, however.

Gallego’s testimony conflicts with that of Humeston and Jackson. Moreover, based on Gallego’s testimony, Cabrera’s demotion was related to his own inability to quickly and efficiently dispatch work, not the failings of any Techs working underneath him. Giving the wrong job to the wrong Tech is not a mistake on the part of the Tech, for which the Foreman is being held responsible; it is the Foreman’s mistake alone.

Even accepting (without evidence) the basic premise that Foremen are responsible for the work of the other Techs in the shop, this does not mean the Foremen are supervisors. In *Shaw*, the Board noted that foremen were “charged with ensuring the performance and completion of the Respondents’ job.” 350 NLRB at 355. These foremen were not found to be statutory supervisors. *Id.* In *Croft Metals, Inc.*, on the other hand:

One lead supervisor testified that he had been warned when it took too long for two trucks to be loaded. The Employer also furnished written disciplinary warnings issued to several lead persons who failed to correct poor performance by their crew members. Those warnings make clear that lead persons are held accountable for the level and quality of production on their lines, and are expected to monitor production, correct problems as they occur, and insure that employees remain busy.

Croft Metals, Inc., 348 NLRB at 719.

According to the Board, the company *Croft Metals, Inc.* proffered sufficient evidence to meet the “*Oakwood Healthcare* ‘accountability’ standard for purposes of responsible direction.”

Id. at 722. However, the “lead persons” at issue were still not 2(11) supervisors:

The remaining question is whether the Employer has carried its burden of proving that the lead persons’ responsible direction of employees is exercised with independent judgment and involves a degree of discretion that rises above the “routine or clerical.” The short answer is no. The sparse evidence put forward by the Employer with respect to the discretion exercised by lead persons in directing other employees actually undermines the Employer’s position. For example, the testimony reflects that ... [employees] once trained in their positions, require minimal guidance. The Employer’s own witnesses, to the extent that they testified about the lead persons’ judgment involved in directing the crews, described such directions as “routine” ... Thus, we cannot conclude that the degree of discretion involved in these activities rises above the routine or clerical.

Croft Metals, Inc., 348 NLRB at 722.

Each of the “undermining” factors present in *Croft Metals, Inc.*, are also present in the instant case. As explained in detail above, Service Techs require minimal day-to-day instruction or guidance from the Shop Foreman. And any “direction” given from a Foreman to a Service Tech will also fall into the category of “routine,” given that is most often involved just handing the RO to the Tech, who then completes the job on their own. Therefore, even if the Employer could produce an example of a Foreman being held responsible for the actions of a Tech (they cannot), this does not necessarily mean the Foreman is exercising independent judgment.

c. The “secondary indicia” of supervisory status weigh against a finding of supervisory status

In “borderline cases,” it is appropriate to consider the so-called “secondary indicia” of supervisory status. *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (9th Cir. 1986); *Northern Mont. Health Care Ctr. v. NLRB*, 178 F.3d 1089 (9th Cir. 1999). One of these factors is whether the employee is perceived as a supervisor. *See, e.g., Helena Laboratories Corp.*, 225 N.L.R.B. 257, 265 (1976); *Aurora & East Denver Trash Disposal*, 218 NLRB 1, 10 (1975) (foreman was supervisor because he led other employees to believe he was one); *Gerbes*

SuperMarket, Inc., 213 N.L.R.B. 803, 806 (1974) (department manager was supervisor where he was regarded by fellow employees as their “boss” and was considered person in authority); *Broyhill Co.*, 210 NLRB 288, 294 (1974) (foreman a supervisor where company placed him in a position such that employees reasonably believed that he spoke on management’s behalf).

Here, there is no reason to reach the issue of secondary indicia, because it is apparent from the above discussion that the Shop Foremen are not statutory supervisors. Ignoring this for the moment, however, these secondary indicia also support a finding that the Foremen are not supervisors. As an example, Shop Foremen do not have their own offices; they work alongside the other Techs in the main shop. (Jackson Test., Day 4; Humeston Test., Day 6.) Like other Service Techs, they have their own stall, lift, and toolbox. (Jackson Test., Day 4.) And they wear the same uniform as the rest of the Service Techs. (*Id.*; Humeston Test., Day 6.)

The Employer might emphasize a colloquialism used at Tracy Toyota from time to time: that the Foremen “run the shop.” (Jackson Test., Day 5; Gallego Test., Day 16.) This statement on its own, with no supporting detail, is not nearly enough to show supervisory status. Indeed it is well-settled under Board law that “[b]eing ‘in charge’ does not establish that foremen exercise supervisory authority.” *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047, n.13 (2003).

i. Compensation

The Employer might claim that Service Tech compensation, which includes elements of “flat rate pay” and hourly clock time, differs slightly from Foreman pay, which includes a monthly bonus. This should not be determinative in a supervisory status inquiry. Moreover, there were similar distinctions between Tech pay and Team Lead pay in *Caliber Motors*:

Although the Team Leaders receive hourly pay similar to that received by the technicians on a scale of between \$ 21 and \$ 32 an hour, they also receive a bonus of 5 cents for each “flagged hour” as described above. In addition, Team Leaders can also receive bonuses for total hours flagged by the dealership that exceed an established goal set by the Service Manager or by Mercedes Benz.

Thus, Team Leaders can receive additional pay based on the performance of their respective teams or by the service department as a whole.

Caliber Motors, at *16-17.

Even in another case where the putative supervisors— called “Team Leaders” in *Caliber Motors*—received a regular bonus payment over and above what is usually received by line technicians, they were still considered employees, and not supervisors. The Judge should make a similar determination here, and not award much weight to the “dispatch bonus.”

ii. COVID-19 response

Soon after the pandemic began, Tracy Toyota management met with various Service Techs in a breakroom to discuss the death of a Tech’s wife from the COVID-19 virus. (Jackson Test., Day 5.) Business Manager Jason Miranda informed workers that he would circulate contact information for management representatives to deal with any workplace safety concerns. (*Id.*) Following this meeting, a flyer was posted with contact details for Miranda and General Manager Jae Lee. (*Id.*) This flyer *did not* include the contact information of either Shop Foremen. Clearly, these individuals are not viewed as part of management.

iii. Management Meetings

According to Gallego, the Employer holds a monthly management meeting with Miranda, Jae Lee, Parts Manager Mike Felix, and Gallego. (Gallego Test., Day 16; ER Exh. 6.) The Shop Foremen do not regularly attend, and neither Humeston nor Jackson have ever participated in any capacity. (*Id.*) Contrast this with *Caliber Motors*, where, again, the Team Leaders were eventually found *not* to be 2(11) supervisors:

The Team Leaders regularly attend meetings with the Service Manager, the Shop Foreman, the Warranty Supervisor, the Parts Manager, and occasionally others. On Mondays, Wednesdays, and Fridays, about half the Team Leaders attend the Monday and Friday meetings, but all of them must attend on Wednesdays. Among the issues generally discussed at these meetings are the status of the teams and the work, customer satisfaction, warranty statistics, and any special advertised deals. Team Leaders frequently relay some of this information to the technicians on their team inasmuch as the technicians do not attend these meetings.

Caliber Motors, at *4. So even if the Tracy Toyota Foremen *did* attend regular management meetings (the record indicates they do not), they still would not necessarily be supervisors.

iv. Providing help or guidance to other Techs

Caro testified that as a backup dispatcher, he will also “help” other Techs if one of them needs it; and “guide” new Techs through the repair process. (Caro Test., Day 3.) Humeston also noted that all of the more experienced Techs, whether or not they are Foremen, help out younger Techs. (*Id.*) Per the Region in *Caliber Motors*, however, this is ultimately not relevant to a determination of supervisory status: “[a] Team Leader can also re-assign a task within his team from a technician who appears to be behind or having trouble.” *Caliber Motors*, at *6. Additionally, “technicians will voluntarily help others out if they see a need,” *id.* at 6-7, and “help others when they [a]re not busy.” *Id.* at 26. Thus, Team Leaders (or Foremen) using their expertise or experience to help younger employees is not indicative of supervisory status.

2. Even if the Shop Foremen are Section 2(11) supervisors, the Employer cannot prove Pro-Union supervisory taint under the Harborside Healthcare standard.

When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors:

(1) Whether the supervisor’s pro-union conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election. This inquiry includes:

(a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and

(b) an examination of the nature, extent, and context of the conduct in question.

(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as

(a) the margin of victory in the election;

(b) whether the conduct at issue was widespread or isolated;

(c) the timing of the conduct;

(d) the extent to which the conduct became known; and

(e) the lingering effect of the conduct.

Harborside Healthcare, Inc., 343 N.L.R.B. No. 100, 2004 WL 2915828, at *6 (2004) (“Harborside”).

d. Section 2(11) supervisory status notwithstanding, the “nature and degree” of the Shop Foreman’s supervisory power is limited

“The Board may appropriately consider the extent of the supervisor’s power over his subordinates.” *Family Fare*, 205 Fed. Appx. at 409 (citing *Harborside*, at *10). “[S]upervisory solicitation is inherently coercive only where the supervisors at issue possess some minimal quanta of authority and discretion.” *Id.* Per the Court in *Family Fare*:

Like all department managers at Respondent’s store, Doran and Kovachevich were low-level supervisory employees and did not possess significant supervisory authority ... Unlike the rather sweeping and unchecked supervisory authority reposed in the charge nurse in *Harborside*, the department managers here exercise limited authority. They had little ability to exercise independent judgment; rather, they participated in supervisory tasks subject to the direction and review of the store director and any assistant store directors ... Moreover, while the department managers had some role to play in employee discipline, the store director became heavily involved in deciding whether significant disciplinary action, such as discharge or suspension, was warranted ... Consequently, Doran and Kovachevich, although properly classed as statutory supervisors, had little authority to impact the daily work lives of employees in their respective departments.

N.L.R.B. v. Family Fare, Inc., 205 Fed. Appx. at 409.

“Consequently, this Court agrees ... the lack of evidence that Doran and Kovachevich had supervisory authority over the employees toward whom their conduct was directed supports a finding of non-objectionable conduct in this case.” *Id.* at 411 (citations omitted).

As explained above, the Shop Foremen at Tracy Toyota are not statutory supervisors. Those arguments will not be repeated here. However, if the Foremen were ruled to be supervisors, they would be far closer to the department managers in *Family Fare* than the charge nurse in *Harborside*. Clearly, the Foremen do not exercise “sweeping and unchecked supervisory authority.” Any authority possessed by Humeston and Jackson is limited in nature, and subject to management oversight. For example, just like in *Family Fare*, whatever role

Foremen play in lower-level discipline, upper-level managers “decide whether significant disciplinary action, such as discharge or suspension, [is] warranted.” (Miranda Test., Day 15.)

This is a key fact; the Board and the federal courts have been very clear that a realistic threat of job loss is a key determining factor in pro-Union supervisory taint cases. *See Waste Management, Inc.*, 330 NLRB 634, 634 fn. 22 (2000) (holding that threats of job loss are highly coercive and one of the most serious forms of election misconduct); *Millard Refrigerated Servs.*, 345 N.L.R.B. No. 95, 2005 WL 2477120, at *4 (2005) (objectionable conduct where ...one supervisor told employees “if the union does not get in, everybody will probably be fired.”)

Here, during the relevant period, it was never a guarantee that Humeston or Jackson would be recalled to the Employer, and be able to exercise what supervisory authority they did have. Even ignoring this, Humeston and Jackson *never* possessed or exercised the authority to fire other employees. Therefore, even if either Foreman had threatened to fire an employee for not supporting the Union—which the record plainly indicates they ***never even got close to doing*** (see below)—this would have been a unrealistic and unbelievable threat. Workers know that only upper management, Department Managers and the General Manager, have the authority to terminate or suspend, just as Miranda said. (Miranda Test., Day 15.) In sum, the “nature and degree” of whatever supervisory authority the Foremen possess is limited.

e. The record is absent of any threats, express or implied, directed from the Shop Foremen to the rest of the bargaining unit.

“Some showing of coercion is required to sustain a finding of objectionable conduct.” *N.L.R.B. v. Family Fare, Inc.*, 205 Fed. Appx. 403, 408 (2006); *see also NLRB v. Manufacturer’s Packaging Co.*, 645 F.2d 223, 226 (4th Cir. 1981) (proper inquiry is whether supervisor’s pro-union conduct “contain[s] the seeds of potential reprisal, punishment, or intimidation”).

The seminal *Harborside* case dealt with the allegedly objectionable prounion conduct of a charge nurse, Robin Thomas (“Thomas”). 2004 WL 2915828, at *3. Thomas engaged in intimidating and threatening behavior, including:

ordering a subordinate employee to attend meetings; threatening that the employee would lose her job if she did not vote for the

union because the employee had signed an authorization card; repeatedly harassing the employee about not attending meetings; threatening the employee two days before the election that her “days here are numbered if this union doesn’t get in, tell your coworkers they need to vote for the union!”; having threatening and intimidating conversations with other employees in which she repeatedly referenced their job security and threatened that they could lose their jobs if they voted against the union; at least one employee into wearing a union pin.

Harborside, at *3.

“The pervasiveness and intensity of [Thomas’] interactions with one employee were such that the employee filed a grievance against the supervisor, alleging that the supervisor “continuously harassed her about supporting the Union.” *Id.* at *9. According to the Board, Thomas’s ability to “reward and retaliate against employees,” along with her “repeated and confrontational references to job loss,” “could reasonably lead [employees] to believe that she was not merely expressing her opinion, but predicting a real prospect that they could lose their jobs.” *Id.* at *8. In other words, given her status, “the employees could reasonably conclude that [she] had the ability to affect their job tenure if the Union lost the election.” *Id.*

Again, the facts of *Harborside* can be compared to those of *Family Fare*:

Thomas’ campaign activity was not only extensive and persistent, but her tactics were badgering, harassing, and intimidating in nature. [She] remained a supervisor and her prounion campaigning continued into the critical period, up to the election ... we find that the effect of her misconduct would not dissipate, but would tend to linger.

Id.

Doran and Kovachevich’s conduct ... was not of the frequency and intensity of that found objectionable in *Harborside* and its progeny. Although Doran initiated the union campaign, and spent substantial time trying to recruit people to be involved in organizing and leading the campaign, the record does not reflect that Doran pressured the employees implicitly or otherwise to support the union. Even if they spoke frequently about the union, there is no evidence that they were putting undue pressure on other employees to join, or that they were engaging in threatening, harassing, or intimidating behavior. Furthermore, the evidence does not suggest that they promised any rewards or implied that rewards would be forthcoming if employees supported the union.

Family Fare, 205 Fed. Appx. at 412.

Ultimately, the Court in *Family Fare* found that while the department managers “may have talked about what the union may be able to do ... that is nothing more than campaign rhetoric and does not constitute the offering of rewards by supervisors in exchange for support.” *Id.*; see also *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980), cert. denied 449 U.S. 844 (1980) (supervisor’s attendance at union meeting and wearing of union button does not contain “seeds of potential reprisal, punishment, or intimidation”). Here the actions of Humeston and Jackson were far closer to *Family Fare* than *Harborside*.

Before, during, and after the walkout, the Service Techs at Tracy Toyota,¹⁸ including Humeston and Jackson, communicated through a private “WhatsApp” group chat. (Jackson Test., Day 13; ER Exh 71, pp. 006-213.) Mr. Juarez was also a member of this chat. Within the group chat, Jackson and Humeston would often inform workers where and when to meet for various Union-related events. (Jackson Test., Day 13.) This does not rise to the level of tainting the Techs’ ability to vote freely. See *Family Fare*, 205 Fed. Appx. at 412 (“Mere supervisory participation in the initial organizing campaign without more does not suffice.”).

On many occasions, Humeston and Jackson were very accommodating in the “100 chat” to Techs who were unable to attend Union events, or even expressed doubts about the Union effort. For example, on June 8, 2020, Humeston requested a “head count for tomorrow.” (ER Exh. 71, p. 073, 6/8/20, 8:42:55 PM.) Ociel Solano confirmed that Humeston was referring to the next morning’s picket action. (Solano Test., Day 17.) Humeston did not demand that anyone attend the picket, or require anyone’s attendance, or expressly or impliedly threaten anyone if they were not able to attend. He simply asked for a head count, and waited for responses.

This process repeated several times. On June 10, 2020, Humeston messaged the group, asking two Techs if they “were able to make it tomorrow,” because “the other guys ... can’t

¹⁸ The “100 chat” included all of the Service Techs, except for one, Travis Catolico. Employees in other job classifications who would later join the bargaining unit were not initially included because the Union initially planned for the Service Techs to make up their own unit. When it became clear that these other employees, including Service Advisors and Parts Employees, would be included in the unit, the Service Techs created a second, larger group chat.

make it.” (ER Exh. 71, p. 079, 6/10/20, 11:40:43 AM.) Solano confirmed that Humeston was referring to the next day’s picket. (Solano Test., Day 17.) Again, no demands, no required attendance, no threats. Humeston just wanted to know who was going to be on the picket line.

Humeston got a response to this message later that day:

[6/10/20, 7:34:42 PM] [Name Redacted]: Kevin, I’m not going to make it tomorrow .. got too much things that’s got to catch up at home ...

[6/10/20, 7:35:43 PM] Kevin Humeston: Ok no problem [name redacted] thanks for letting me know

(ER Exh. 71, p. 080.)

After noting that attendance was going to sparse at the next day’s picket, Humeston still says it was “no problem” that another Tech could not make it. This is the opposite of coercive or threatening behavior—Humeston is making it extremely clear that Techs need not participate in Union activities if they are not able. Under any reasonable interpretation of his comments, he is not placing “undue pressure on other employees to join” the Union, nor is he “engaging in threatening, harassing, or intimidating behavior.” *See Family Fare*, 205 Fed. Appx. at 412.

On June 29, Humeston sent another head count request to the group chat, clarifying that “if you can’t come just let me know, but I would appreciate any participation.” (ER Exh. 71, 6/29/20, p. 129, 11:50:08 AM.) Solano testified that this was referring to the next day’s picket. (Solano Test., Day 17.) Humeston again makes clear that if any Techs are not able to attend the picket, this is not a problem. This accommodating and friendly behavior bears zero resemblance to the coercion and pressure on display in cases such as *Harborside*.

In another example of this pattern, Humeston sent a Zoom invitation to the group chat for a Union meeting, stating that he would “like the whole team to attend.” (ER Exh. 71, p. 090, 6/14/20, 11:08:52 AM.) He does not demand attendance, despite this subject of this meeting being “recent developments that have come to light” and “where we are at in the process of the hearing, unionization etc.”—he merely states that he would “like” the team to attend. (*Id.*) Again, no pressure, intimidation, or coercion. If a Tech did not want to participate in the

meeting, according to Humeston, they need not do so. Additionally, Humeston stated in the message that “[d]uring the meeting everyone will be able to voice their thoughts and opinions and ask questions.” (*Id.*) Once again this is the opposite of threatening or coercive behavior; Humeston is making it immensely clear that the opinion of every Tech is valid and will be heard, and that no one will be compelled to share the same views.

Jackson’s actions were consistent with Humeston’s. For example, on June 15, a Tech sent a message saying that “won’t make it today but I’ll be there tomorrow.” (ER Exh. 71, p. 091, 6/15/20, 7:07:03 AM.) Solano testified that this was referring to the next day’s picket. (Solano Test., Day 17.) Jackson responded with a “thumbs up” emoji. (ER Exh. 71, 6/15/20, p. 091, 7:09:49 AM.) Another Tech then messaged the group, stating that “[expletive] came up so I’m booked for tomorrow too, don’t hate me lol.” (*Id.*, 10:53:34 AM.) Jackson’s response: “Never hate you [name redacted].” (*Id.*, 11:23:03 AM.) Like Humeston, Jackson is being as accommodating as possible to Techs who cannot attend Union events. Neither Jackson nor Humeston could credibly be viewed as pressuring or coercing Techs to support the Union.

Even when a Tech informed the group chat that there was a “negative influencer” in the Shop, Jackson did not make any effort to pressure or intimidate this individual into supporting the Union. (ER Exh. 71, p. 126, 6/29/20, 9:02:00 AM.) Instead, Jackson responded that “[i]t’s ok, just keep the other guys positive,” and that this individual should be taken off the list. (*Id.*, 9:02:34 AM, 9:03:03 AM.) Again, here is a Foreman learning that a potential voter is likely not going to support the Union, and making clear to other Techs in the chat that this acceptable—that employees have free choice, that the Union supporters should focus on maintaining their own ranks, and that this individual should simply be removed from the list of supporters. Any Techs in the chat who might have been wavering about their own support could look to this exchange and see that if they decided to back out, they would not face hostility from Jackson.

Perhaps the best example of this pattern came on June 15, 2020. The Techs were discussing the possibility of a second walkout in the “100 chat.” Below is an exchange between a Tech who was currently working at the facility, and Jackson, who had still not been recalled:

[6/15/20, 8:18:10 PM] [name redacted] I'll say it here how I see it guys... and I'm gonna be 100% real from my prospective (sic) weather (sic) anyone agrees or not... I was in it with you guys from the beginning and still am..and my wish and objective is to somehow get you boys back in the shop cause we need you guys.. but for me, I feel that walking out for the second time and putting the income for my family at risk is much larger than anything we're fighting for.. I'm sorry that I can't take that step to do what you guys expect out of me at this time.. but reverse roles and I will never expect that out of you men.. please don't make this a test of loyalty cause I will never put you guys in that position.. I'm still with you guys and I believe things are still moving forward what we're fighting for.. correct me if I'm wrong hit this is my point of view at this time...

...

[6/15/20, 8:40:12 PM] Tyrome: I understand where you're coming from [name redacted] and don't want you to feel any pressure about taking care of your family. I know your (sic) with us at the end of the day. I just want you to understand that Jesse has been doing this for a long time and understand the in and outs of unionizing and making the right decisions. I feel that any move we make is not to single you out, but it made for the better of all the men. I think the idea of walking out a second time was brought up to help the other 10 men get back in sooner and help feed their families. I personally don't want you to feel like that and respect you for saying how you really feel. It's all love Brotha

(ER Exh. 71, p. 092, 6/15/20, 7:09:49 AM.)

The unnamed Tech in this conversation is expressing real anxiety about the possibility of a second strike, and the effect of any accompanying loss of wages on his family. Instead of dismissing these concerns, or threatening, pressuring, or coercing the Tech to participate in a walkout, Jackson responds directly that he *does not* want the Tech to feel any pressure. Jackson states his own view of the situation, but also notes that he respects this Tech for his comments, and he knows the Tech is “with us.” This is a clear message to this Tech—and all of the other Techs in the group chat—that there is no pressure or coercion coming from Jackson regarding participation in *any* Union activities, even for something as important as a second walkout.

Finally, notwithstanding the Employer's arguments to the contrary, Jackson requesting that fellow Techs inform the authorities that Foremen are not supervisors does not rise to the level of an express or implied threat. (ER Exh. 71, at p. 030.) At the time Jackson sent this message, not only was he no longer a Foreman, but he was no longer even working at the jobsite

(see below). There no guarantee Jackson would return to work, and there was no guarantee that even if he did, he would return to his former role as a Foreman. And ultimately, when Jackson was recalled, it was as a Line Tech, not a Foreman

f. During the relevant time period, the Shop Foremen were not even present at the jobsite, and could not influence the bargaining unit

As noted above, Humeston and Jackson participated in the May 15 walkout. They were not reinstated with the first group of employees on May 22. Humeston was not recalled until mid-June, while Jackson did not return until September. There was *never* a guarantee that these employees would return to work before the election; and even if they did, there was no guarantee they would return to their role as Foremen (Jackson never did). Therefore, any alleged objectionable pro-Union actions taken by these individuals would have had little lingering impact on the voting unit, who were not seeing Humeston or Jackson every day, and were not sure if they would *ever* see them back at work again.

On June 17, an unnamed individual messaged the “100 chat,” informing the group that the bargaining unit had been expanded to include additional workers, including parts employees and Service Advisors. (ER Exh. 71, p. 095, 6/17/20, 7:35:38 AM.) Mr. Juarez responded that he was “working on a new flyer for tomorrow to give them and gauge their interest. (*Id.*, 7:36:22 AM.) Jackson then stated that “[t]he guys inside got to use that mouth piece.” (*Id.*, 7:43:22 AM.) This is specifically referring to the Techs who had already been recalled by this point. Jackson is stating that these individuals have the power to educate new potential voters, such as the parts employees and Service Advisors, about the Union, whereas those who had not yet been recalled—like Jackson and Humeston—did not have this power.

Two days later, Jackson shared a message from Mr. Juarez in the “100 chat”: “As per Jesse: I need the 4 inside to share with parts dept and writers or whoever has a writers or part guys cell number ... we need to educate those workers, so they know what’s going on. We need to gauge the support level from inside parts dept.” (ER Exh. 71, p. 100, 6/19/20, 8:06:25 AM.) Once again, the message is clear: the four employees who were recalled to the shop on May 22

(Caro, Solano, Mong Lo, and Phong Lo) need to inform the newly added parts employees and service advisors about the Union, and determine their support level. Techs like Humeston and Jackson, who were still at home waiting to be recalled, did not have the ability to contact these employees at all, let alone exert any undue pressure or influence on them.

This situation is comparable to *SSC Mystic Operating Co., LLC v. N.L.R.B.*:

We also agree with the Board that Mackin's firing limited the effect of her conduct despite the fact that she assured employees that the Union would help her get her job back ... Mackin's firing had broken whatever hold she might have exercised over employees ... The Board was also entitled to conclude that the length of the time between Mackin's discharge and the election further limited the impact Mackin's efforts could have had on the outcome ... Nor did Mackin's conduct "linger[]," ... as any influence she might have wielded at one time dissipated before the end of the election period.

801 F.3d 302, 312-13 (2015).

Here, just as in *Mystic*, Humeston and Jackson's status on the preferential recall list—i.e., not being at work—limits the effect of their alleged pro-Union conduct.

g. The Shop Foremen do not supervise, or even interact with, a large portion of the bargaining unit, and thus cannot "taint" their vote

"Where statutory supervisors do not actually exercise power over the solicited employee, such solicitation does not rise to the level of inherently coercive conduct." *Family Fare*, 205 Fed. Appx. at 411. Presuming, for the sake of argument, that the Shop Foremen are supervisors, this does not mean they can exercise supervisory authority over every employee in the entire dealership. This is relevant here, as the voting unit includes not just Service Techs—over whom the Foremen would theoretically have power—but also Service Advisors, who report directly to Gallego (Gallego Test., Day 14), and Parts Employees, who report to the Parts Manager.

The Employer presented zero evidence that the Foreman could even in theory exercise any authority over these groups of employees, who constitute a sizeable chunk of the bargaining unit (13 out of the 37 eligible voters.) This means that the maximum number of workers that Humeston or Jackson could have *theoretically* influenced in the election was 24.

h. The Employer's well-documented anti-Union actions effectively

counteract any pro-Union activities from the Shop Foremen

“The employer’s antiunion stance [is] relevant to the second prong of the test—that is, whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.” *Harborside*, at *13. “An employer’s antiunion campaign may mitigate the coercive effect of impermissible pro-union supervisory authority. *Id.*; see also *Family Fare*, 205 Fed. Appx. at 411-12 (“Respondent’s full-scale antiunion campaign ... mitigates any likelihood that the supervisors’ solicitation had any impact ... on the decision-making process of the solicited employees.”)

“[I]f the employer works at cross-purposes to a supervisor’s pro-union activity during an election, the employer may end up neutralizing the supervisor’s wrongdoing and inadvertently preserve the conditions necessary to reach a valid election result.” *Mystic*, 801 F.3d at 310. In *Mystic*, the pro-Union supervisor’s “efforts did not materially affect the election’s outcome because Mystic adequately made up for them by disavowing Mackin’s conduct and by running its own antiunion campaign.” *Id.* The company “required employees to attend anti-union meetings” and “posted materials in the workplace.” *Id.*; see also *Terry Machine Co.*, 356 N.L.R.B. No. 120, at *2-3, 5 (2011) (where supervisors were “actively involved” in a union organizing drive, but at the same time, the employer “engaged in an extensive [anti-union] campaign,” including “mandatory company-wide meetings” and “antiunion postings,” the Board upheld the election result despite the supervisors’ substantial pro-union conduct).

In the instant case, the Employer passed out literature to employees during the Union campaign with the title, “Can You Afford a Strike?” (U Exh. 1.) Solano testified that he received this flyer from the Employer. (Solano Test., Day 17.) The text of the flyer stated:

A strike can be a crippling experience for employees’ personal finances. You are on your own when it comes to paying your bills and feeding your family. If contract negotiations result in a strike, you will not receive a paycheck from Tracy Toyota. Additionally, employees who are out of work because of a strike, are not eligible for unemployment benefits ... Finally, the Machinists union will not pay your personal bills. (U Exh. 1.)

The flyer also includes a list of potential household expenses, and a “???” next to “Union strike benefits.” According to the flyer, “[i]f the union takes you out on strike – **YOU ARE ON YOUR OWN!** (*Id.* [emphasis in original].) The final message demands of employees: “[i]f you cannot afford to strike – VOTE ‘NO’ in this mail-ballot election.” (*Id.* [emphasis in original].) From this flyer and the other actions detailed below, the position of management on the Petitioner’s organizing campaign is clear—and it is not pro-Union.

Solano testified that he participated in a captive audience meeting at the workplace with a consultant hired by the Employer. (Solano Test., Day 17.) These meetings were also referred to in the “100 chat,” where one Tech noted that “all slides were attacking Jesse [Juarez] and the union,” and another reported that the consultant “[p]reaty (sic) much was just bashing on jesse of how he ‘insults’ management in his emails, and a bunch of crap about how the union didnt give us all the ‘truthfull’ information...” (ER Exh. 71, p. 135, 7/2/20, 11:17:48 AM, 1:44:14 PM.)

On May 22, a Tech relayed to the “100 chat” that “we had a meeting with [GM] Jae Lee earlier giving his statement and trying to rid of the Union.” (ER Exh. 71, p. 030, 5/22/20, 11:40:27 AM.) Later, a Tech shared that he had received a copy of a nine-page speech given by Lee, wherein Lee stated that the Union “only wants your money[,] ask about the union dues and registration fees.” (ER Exh. 71, p. 039, 5/26/20, 3:31:32 PM, p. 040, 5/26/20, 3:52:38 PM.)

On June 24, a message was shared to the chat stating “[t]hey said [Parts Manager] Mike Felix came up to them and tried to get on a personal level saying ‘I care about you guys and I take care of you guys, you shouldn’t need a union because I take care of all of you ...you don’t want to have to go on strike and lose your job like everyone outside ...’” (ER Exh. 71, p. 117, 6/24/20, 5:03:24 PM.) The next day: “Mike is trying to turn the writers. I walked into parts and heard him telling them the union is a bad idea.” (ER Exh. 71, p. 117, 6/25/20, 9:43:36 AM.)

Taken together, the captive audience meeting, the flyer, and various one-on-one meetings constitute a substantial anti-Union campaign on the part of the Employer. Cases such as *Harborside*, *Family Fare*, *Mystic*, and *Terry Machine*, among others, would dictate that these actions diminish any allegedly inappropriate pro-Union conduct from Humeston or Jackson.

i. Other mitigating factors weigh against a finding that pro-Union supervisory taint impacted the election

As noted above, the Union won this vote by a clear majority, 17 votes to 8 votes. More than double the number of employees who voted against the Union voted for it. This is a key factor weighing against overturning the election. *See Mystic*, 801 F.3d at 312 (“The Union won by 64 votes to 40, or almost one quarter of the voting population, indicating that any influence Mackin might have wielded over a few employees could not possibly have altered the result.”).

Ignoring that Humeston and Jackson were not at work for much of the relevant period, and that they had no authority over at least 13 voters based on their job classifications, the fact that Humeston and Jackson were only two individuals out of a group of 37 is also relevant. *See Mystic*, 801 F.3d at 312 (“Mackin was the sole pro-union organizer, naturally limiting the total amount of pressure that could be brought to bear on the Union’s side of the ledger.”)

B. THE EMPLOYER FAILED TO MEET ITS BURDEN OF PROVING OBJECTION NUMBER 16(A)

The Employer objected to the conduct of the election on the grounds that Mr. Juarez revealed Spier’s name, home address, and telephone over a megaphone during a picket action outside the Employer’s premises. According to the text of Objection 16(a):

Juarez, in front of voters, verbally attacked (sic) another replacement technician Josh Spier when Juarez thought Spier did not support the Union. In front of other voters and in open public Juarez called out Spier’s private information over the megaphone including his name, telephone number and home address.

(GC Exh. 1(r), Attachment “A”.)

Section 8(b)(1)(A) prohibits threats, violence, harassment, intimidation, and coercion of employees by a picketing labor organization. It also prohibits such misconduct when directed toward nonemployees so long as “the acts were committed in the presence of employees, whose Section 7 rights might be affected” or “the acts were sure to become known to employees and employees would regard [them] as an indication of what may befall them if they fail to support the [picketing].” *Local Joint Executive Bd. of Las Vegas*, 323 NLRB 148, 159 (1997), citing *Auto Workers Local 695 (T. B. Wood’s)*, 311 NLRB 1328, 1337 (1993); *Meat Packers (Hormel*

& Co.), 291 NLRB 390, 395 (1988); *Teamsters Local 115 (Oakwood Chair)*, 277 NLRB 694, 698 (1985); *Lumber Workers Local 3171 (Louisiana-Pacific)*, 274 NLRB 809 (1985).

The test for determining restraint and coercion is “whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.” *Local Joint Executive Bd. of Las Vegas*, 323 NLRB 148, 159 (1997), citing *NLRB v. Service Employees Local 254*, 535 F.2d 1335, 1337-1338 (1st Cir. 1976); *Plumbers Local 38 (Bechtel Corp.)*, 306 NLRB 511, 518 (1992).

As a threshold matter, the Employer may argue that the megaphone incident must analyzed in the context of other events, such as Vega making a brief, unannounced visit to Spier’s home. (Spier Test., Day 6.) For his part, Vega admitted that he made this visit, but added that he lives close to Spier, that the pair had known each other for 15 years, that he had visited Spier’s home previously, and that he attempted to call Spier before going over. (Vega Test., Day 14.) Various other allegations of improper Union activities directed at Spier were raised in the Employer’s Objections; all of these were overruled and found to be without merit. (GC Exh. 1(r), Attachment “A”.) Therefore, this “context” should not be considered, as it would prejudice the Union and permit the Employer another bite at the apple on these Objections.

Additionally, it is worth noting that Spier may not be an employee under the Act. The Employer maintains that Spier was a Foreman at the time of these events. Therefore, like Jackson and Humeston, he must be a statutory supervisor. The Employer cannot have it both ways. If Mr. Juarez’s comments were directed only at a supervisor, and no employees heard them or became known of them—the Employer did not present *any* evidence that the comments reached beyond the ears of Spier, not from a manager, employee, or third party—the Union could not possibly have violated Section 8(b)(1)(A). A “supervisor” like Spier would not be eligible to vote in any election; if he was the only one who heard the comments, there is no objectionable conduct. *See Local Joint Executive Bd. of Las Vegas*, 323 NLRB at 159 (Section 8(b)(1)(A) proscribes threats ... when directed toward nonemployees so long as the acts were committed in the presence of employees, whose Section 7 rights might be affected.”)

The same concern applies even if Spier is an employee under the Act. Again, the Employer presented *no evidence* that anyone besides Spier heard Mr. Juarez's alleged comments. The Union won the election by a large majority. If Spier was the only one who heard his name and address over the megaphone, he is the only one whose rights might be affected, who might be coerced into voting for the Union. One single vote is not enough to swing this election. If the Employer wanted to show that Juarez's actions—which took place over the course of one day for between 5 and 10 minutes—were sufficient to intimidate enough employees to change the election result, they needed to present more witnesses who were affected by the conduct, or at least heard or saw it. They failed to do so.

1. The Employer failed to provide corroborating evidence supporting its contention that Mr. Juarez announced Mr. Spier's name and address

According to Spier, the alleged objectionable conduct occurred for a period of 5 to 10 minutes over one day in mid-June 2020, before the Employer hired a security guard to oversee the picket. (Spier Test., Day 17.) The Employer provided the Union with a voter list, which included every eligible voter's home address, on June 26, 2020.¹⁹ (U Exh. 4.) Thus, it is unclear how the Union or Mr. Juarez would even have obtained Spier's home address in "mid-June," when Spier claims this conduct occurred, before the voter list even went out.

Even if the Union did somehow have access to Spier's home address during this time period, the Employer failed to provide any audio, video, or in-person corroborating evidence. They could not even find one other witness to confirm that Juarez actually revealed Spier's address over the megaphone. There is no reason that Spier should be considered any more credible than Juarez, who denies that the conduct occurred. (Juarez Test., Day 17.) Thus, the Employer has not met its burden of proving a prima facie case of objectionable conduct.

¹⁹ The parties executed a stipulated election agreement on June 24. (U Exh 3.) The agreement provides that the Employer would provide a voter list within two days. (*Id.*) Thus, it is impossible that the Union would have had access to the voter list before June 26.

2. **Even if the Employer's version of events is accurate, Board law does not support the finding of an objection on this basis**

Prior cases where picket line behavior has resulted in overturning an election result have involved far more egregious conduct than anything that is even alleged to have occurred in this case. For example, in *Local Joint Executive Bd. of Las Vegas*:

Albert Glen Vaught ... heard a female picket, named "Terry," shout into the casino through an electric bullhorn "we know who you are and we know where you live." Vaught further testified that he had heard and observed Terry using the bullhorn earlier that evening and on other occasions and that she normally confined her conduct to shouting at people inside the casino, calling them "losers" and "boozers ... [T]he picket saw Wilcox and shouted "[W]e ... know who you are, we will get you."

323 NLRB at 152.

In the instant case, there is no allegation that Juarez said anything to the effect of "I know where you live" or "I will get you" in the direction of Spier. There is no threat, express or implied, of the type recognized in prior cases.

Whereas in *Auto Workers 695 (T. B. Wood's)*:

The pickets surrounded and stopped their vehicles, cursed at them and told them: "I'm coming to get you, I know where you live." He observed pickets videotaping the workers as they exited and saw Union President doing what appeared to be writing down their license numbers, as he would look in the direction of the license plate as vehicles went by, and in some instances those standing nearby would repeat the license numbers.

Ewing testified that picket Ken Flory was at the picket line primarily on Friday afternoons. He would walk in front of vehicles and block them, curse the occupants and say he was going "to kick their ass," that he knew where they lived and that he was coming to their house.

Sollenberger also testified that during the first or second week of July when he was stopped at the entrance by pickets walking in front of his vehicle, picket Larry Thomas, who he knew from a previous employment elsewhere, told him that he should not be coming to work there, that he knew that Sollenberger had two children and while they didn't know where he lived, they were trying to find out.

311 NLRB at 1330.

Not only is the conduct in a case such as *T.B. Wood's* far more egregious than anything that is alleged here, the sheer number of objectionable actions taken by the union in that case made it far likelier that the election would be overturned. Here, there is only one incident that took place over a 5 to 10 minute span on one day. So not only is the Employer's allegation here far less serious than the allegations in *T.B. Wood's* or *Local Joint Executive Bd. of Las Vegas*, but a single incident is less likely to be so serious as to require overturning an election.

Lastly, in the *T.B. Wood's* decision, the Board does well to explain why a statement such as "I know where you live" on the picket line might be objectionable:

These threats ranged from the brutally specific, as in the cases of one striker's threats to rape Cindy Rook and another's threat to Jeffrey Eckenrode that he would kill Eckenrode and his family, to the general, as in the cases of strikers who threatened "to get" or beat up various workers who crossed the picket line ***or told them they knew where they lived, implying, that in addition to the abuse they underwent entering and leaving the plant, they would be subject to more at their homes***, and from the offbeat, as in the case of the striker who told Mark Brooks there were 25 ways to kill a man, to the inane, as in the case of the strikers who implied that they were going to steal James Hardy's refrigerator.

311 NLRB at 1330 (emphasis added).

This logic does not apply here. If "I know where you live" is an "implied threat," with the implication being that the abuse an individual is suffering on the picket line will continue when they return home, there is no such threat in this instance. Neither Spier, nor any Tracy Toyota employees, nor any third parties, nor anyone associated with the Employer, testified or presented any evidence that they experienced physical or verbal abuse on the picket line at Tracy Toyota. If the implied threat is that something currently occurring on the picket line is going to carry over from the worksite, and follow you back home, that threat cannot exist if there is nothing objectionable going on in the first place.

So unlike in *T.B. Wood's*, Spier would have no reason to fear "continued abuse" traveling from the workplace back home, because there is no evidence of any abuse at the picket line. Spier would not be justified in thinking the disclosure of his address was a threat, because, unlike in *T.B. Wood's*, he had no prior experience to on which to ground the threat.

Again, the Employer failed to present *any* evidence that any Tracy Toyota employees aside from Spier heard Mr. Juarez make any statements related to Spier’s address. Thus, even if the events occurred exactly as the Employer describes, only one employee—at maximum—could have been “restrained or coerced” by these statements. As noted above, the election was decided by far more than one vote. This is insufficient to swing an entire election..

IV. CONCLUSION

For the above reasons, Petitioner respectfully requests that the Judge overrule the remaining Objections to the conduct of the election, certify the election result, and order the Employer to bargain collectively with the Union.

Dated: April 19, 2021

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION

/s/ WILLIAM T. HANLEY

CAREN P. SENCER
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Attorneys for Charging Party/Petitioner

**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On April 19, 2021, I served the following documents in the manner described below:

PETITIONER'S POST HEARING BRIEF

- ✓ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from rfortier-bourne@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 19, 2021, at Alameda, California.

/s/ Rhonda Fortier-Bourne
Rhonda Fortier-Bourne

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